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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SUE SUTER, *et al.*,

Petitioners,

v.

ARTIST M., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Section 671(a)(15) of Title IV-E of the Adoption Assistance and Child Welfare Act of 1980 (the "AAA"), 42 U.S.C. § 671(a)(15), which requires that states have a plan to ensure that "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home," is too vague and amorphous to create an individually enforceable right under 42 U.S.C. § 1983 ("Section 1983") in the complex area of child welfare.

2. Whether children living at home, who are not in foster care, have enforceable rights under Title IV-E of the AAA, which provides reimbursement for "foster care maintenance payments," when the state receives no federal Title IV-E funds to provide services to those children.

LIST OF PARTIES

The parties to the proceedings below were petitioners Sue Suter (and her predecessors Jess McDonald and Gordon Johnson), Director of the Illinois Department of Children and Family Services ("DCFS" or the "Department"), and Gary T. Morgan, DCFS Guardianship Administrator, both sued in their official capacities. Respondents included Artist M., Sarah B., Claude F., Algienan G., Myron C., Willie M., Brandon W., and Amber B., individually and on behalf of all similarly situated individuals, by their next friend Patrick T. Murphy, Public Guardian of Cook County.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Sue Suter and Gary T. Morgan respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on October 29, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 917 F.2d 980 and is reprinted in the appendix hereto, *infra* p. 1a.

The opinion of the United States District Court for the Northern District of Illinois (Shadur, J.) on petitioners' motion to dismiss is reported at 726 F. Supp. 690 and is reprinted in the appendix hereto, *infra* p. 32a. The injunctions entered by the district court on March 2 and April 3, 1990, are unreported and are reprinted in the appendix hereto, *infra* pp. 51a-58a.

JURISDICTION

Respondents brought this action in the Northern District of Illinois under 42 U.S.C. § 1983, alleging violations of the Fourteenth Amendment to the Constitution and Title IV-E of the AAA, 42 U.S.C. §§ 670-679a. The district court's jurisdiction was based on 28 U.S.C. §§ 1331, 1343, 2201, and 2202. The district court held a hearing on respondents' motion for a preliminary injunction in January 1989, but deferred ruling at that time. Petitioners then moved to dismiss respondents' complaint. On November 21, 1989, the district court granted petitioners' motion in part, dismissing respondents' constitutional claims but refusing to dismiss the statutory counts. (App. 50a). The district court entered a preliminary injunction on March 2, 1990 (App. 51a), and an order modifying that injunction to impose reporting requirements on April 3, 1990 (App. 57a).

Petitioners filed timely notices of appeal from the injunction orders on March 30 and April 5, 1990. Appellate jurisdiction was based on 28 U.S.C. § 1292(a)(1). In addition, petitioners asserted, and the Seventh Circuit exercised, pendent appellate jurisdiction over the district court's order denying in part petitioners' motion to dismiss. The Seventh Circuit exercised its jurisdiction to review the motion to dismiss ruling because the injunction turns on the validity of that order, and the ruling is interdependent with the injunction. *See Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940) (court may hear appeal of motion to dismiss ruling in connection with injunction appeal).

On October 29, 1990, a sharply divided Seventh Circuit panel affirmed the district court. (App. 1a). Judge Cummings wrote the majority opinion, joined by Senior Judge Eschbach. Judge Manion filed a strongly worded dissent. Petitioners filed a petition for rehearing with suggestion for rehearing en banc on November 14, 1990. On December 20, 1990, the court denied that petition. (App. 31a).

This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 671(a)(15) of Title IV-E of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(a)(15), provides, in pertinent part:

> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—
>
> . . .
>
> (15) . . . provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

STATEMENT OF THE CASE

This case presents important issues concerning whether *Wilder v. Virginia Hospital Association,* 110 S. Ct. 2510 (1990), abrogated the careful limits on implication of enforceable rights from spending-clause statutes announced by this Court in *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1 (1981). The majority opinion below holds that Section 671(a)(15) of the AAA, which requires that states make "reasonable efforts" to prevent foster care placements and reunify families, creates enforceable rights under Section 1983. That holding is flatly contrary to this Court's holding in *Pennhurst* that a vague statute cannot create enforceable rights. In addition, the majority holds that children residing at home may enforce Section 671(a)(15) despite the fact that the states receive no Title IV-E funding to serve those children, again deviating from *Pennhurst*'s mandate.

Respondents filed this action for declaratory and injunctive relief under Section 1983 on December 14, 1988, alleging that DCFS has violated the Fourteenth Amendment and Title IV-E

of the AAA by failing promptly to assign and reassign caseworkers to respondents' cases. Respondents represent two classes of children. Class A includes children who are or will be in the custody of DCFS pursuant to temporary custody orders entered by the Circuit Court of Cook County, Juvenile Division (the "Juvenile Court"), *and* children who remain in their own homes under orders of the Juvenile Court. Class B is a subclass of Class A and encompasses only those children in DCFS custody.

On the same day respondents filed their Complaint, they filed a preliminary injunction motion seeking (i) assignment of a caseworker to respondents' cases within 24 hours following the initial Juvenile Court order and (ii) continuous caseworker assignment thereafter. On January 17-19, 1989, the district court held a hearing on respondents' preliminary injunction motion. Petitioners presented evidence at the hearing of a Reorganization Plan that the Department had voluntarily instituted to ensure that caseworkers are assigned to cases promptly. The court deferred ruling on respondents' motion for several months.

Because petitioners believed respondents' Complaint lacked any *legal* foundation, petitioners moved under Fed. R. Civ. P. 12(b)(6) to dismiss the Complaint for failure to state a claim upon which relief can be granted. On November 21, 1989, the district court granted petitioners' motion to dismiss respondents' constitutional claims, but refused to dismiss any of respondents' claims under the AAA. (App. 32a). Petitioners filed a motion to reconsider the court's ruling, which the court denied on December 7, 1989. However, in ruling on the motion to reconsider, the district judge orally clarified the November 21 Order, stating that the only remaining legal basis for respondents' claims was the "reasonable efforts" provision of the AAA, 42 U.S.C. § 671(a)(15).

Following additional discovery and briefing, on March 2, 1990, the court entered a preliminary injunction, which requires that DCFS assign a caseworker to all court cases within three working

days of the initial Juvenile Court order and that no case remain unassigned for more than three working days at any time thereafter. The order applies to all class members, including all children who remain at home under Juvenile Court orders. (App. 51a).

On respondents' motion to amend the preliminary injunction, the district court on April 3, 1990, modified the injunction to require that DCFS each week provide respondents with a list of newly assigned or reassigned cases, their assigned caseworkers and those workers' telephone numbers, and any previously assigned workers, for the stated purpose of monitoring petitioners' compliance with the March 2 Order. (App. 57a).

Petitioners filed timely notices of appeal from the March 2 and April 3 Orders and moved before the district court to stay both orders pending appeal to the Seventh Circuit. The district court denied that motion on April 9, 1990, and provided an explanation as to what "reasonable efforts" the court believed were required by Section 671(a)(15) of the AAA. The district court concluded that, in initiating voluntary efforts to improve case assignment procedures, the Department itself had defined what reasonable efforts were required by the AAA, and, since the Department's efforts were only 75 percent effective, petitioners had failed to exercise reasonable efforts.

After expedited briefing and oral argument, the Seventh Circuit entered an order on June 21, 1990, which was modified on June 27, 1990, partially remanding the case to the district court. The court of appeals instructed the district court to make factual findings as to the amount of delay in caseworker assignment and reassignment at the time the injunction issued. The district court made the requested findings based on submissions from the parties and issued its opinion on July 25, 1990.

On October 29, 1990, the Seventh Circuit, in a split decision, affirmed the district court's orders denying in part petitioners' motion to dismiss and granting respondents' motion for a prelimi-

nary injunction. (App. 1a). The majority opinion, written by Judge Cummings, holds that the "reasonable efforts" clause creates an enforceable right to reasonable efforts to prevent removal of children from their homes and to reunify children with their families. Moreover, the court extends that enforceable right not only to children in foster care, but also to children residing at home, for whom DCFS receives no federal funds under Title IV-E.

Judge Manion filed a vehement dissent, accusing the panel majority of "inventing rights which interfere with the foster care system" (App. 27a), and of allowing a narrow focus on *Wilder* to distract the court from "the more applicable legal standards and reasoning of *Pennhurst*" (App. 21a). The dissent warns that "[t]his opinion moves the court from its proper role as impartial arbiter . . . to that of a crisis administrator of child welfare." (App. 29a-30a). Judge Manion recognized that, by allowing any individual involved in the child welfare system to sue for "reasonable efforts," the majority vastly expands federal court intervention into state child welfare decision making, opening the door for an "avalanche" of individual cases for which the federal courts are unprepared and ill-suited. (App. 29a).

Petitioners filed a timely motion for rehearing with suggestion for rehearing en banc on November 13, 1990, which the court denied on December 20, 1990. (App. 31a).

REASONS FOR GRANTING THE WRIT

This appeal concerns the limits on the power of federal courts to impose massive new financial obligations on the states through implication of private rights of action from a vaguely worded federal statute. This Court considered that question most recently in *Wilder v. Virginia Hospital Association,* 110 S. Ct. 2510 (1990), and held that courts may create rights from congressional silence only after reviewing the statute, its legislative history, and the

implementing regulations to determine whether the statute is sufficiently mandatory and specific to evince a congressional intent to create privately enforceable rights.[1] The decision below analogizes to *Wilder*'s holding but fails to apply the test set out by this Court. By implicitly and incorrectly reading *Wilder* to abrogate the careful limits placed on Section 1983 by *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1 (1981), the Seventh Circuit has opened the federal courts to what the dissent aptly predicts will be an "avalanche" of individual cases seeking federal judicial interference in the delicate area of child welfare.

In this case, a sharply divided Seventh Circuit created sweeping substantive rights from a statutory provision, 42 U.S.C. § 671(a)(15), requiring the states, "in each case," to make "reasonable efforts" to prevent removal of children from their homes or to reunify families. That "reasonable efforts" clause is contained in Title IV-E of the AAA, 42 U.S.C. §§ 670-79a, a federal-state cooperative funding statute that reimburses states for certain "foster care maintenance payments" upon adoption of a state plan meeting statutory requirements.

Under the test set out by this Court in *Pennhurst,* 451 U.S. 1, and clarified more recently in *Wilder,* 110 S. Ct. 2510, the vague "reasonable efforts" clause is insufficiently specific to create individually enforceable rights, such as the right to immediate and

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[1]Respondents brought their claim under Section 1983 and directly through an implied private right of action under the AAA. In both instances, the inquiry turns on whether Congress intended to create privately enforceable rights. *Compare Wilder,* 110 S. Ct. at 2517 (Section 1983) *with Touche Ross & Co. v. Redington,* 442 U.S. 560, 575 (1979) (most important factor in evaluating proposed implied private right of action is congressional intent). For the same reasons that the AAA's "reasonable efforts" clause creates no enforceable rights, discussed below, the statute cannot be the basis for an implied right of action under the more stringent standard of *Cort v. Ash,* 422 U.S. 66 (1975). *Cf. Thompson v. Thompson,* 484 U.S. 174, 108 S. Ct. 513, 522 (1988) (Scalia, J., concurring) (Court has refused to imply private right of action in nine of eleven recent cases).

continuous assignment of a child welfare specialist asserted by respondents here. Moreover, the court below expanded that novel right still further by extending the AAA's protection to children residing at home, despite the fact that the states receive no federal funds with which to serve such children.

By simply addressing *Wilder's result*, the decision below fails to apply the *Wilder test* and conflicts directly with *Pennhurst*. The majority opinion evidences a confusion as to *Pennhurst*'s continued vitality after *Wilder*. Petitioners urge this Court to grant certiorari to clarify that *Wilder* does not cast doubt on *Pennhurst*, but instead reaffirms the cardinal principles that a vague statutory provision cannot create enforceable rights and that the courts will not imply private rights from a cooperative funding statute where the statute provides no federal dollars to fund such obligations.

Moreover, the Seventh Circuit opinion creates a conflict in the circuit courts. Although no court of appeals has fully discussed this precise issue, the Eighth Circuit has affirmed a district court decision in a slightly different context holding that Section 671(a)(15) does *not* create enforceable rights. *In re Scott County Master Docket*, 672 F. Supp. 1152 (D. Minn. 1987), *aff'd sub nom. Myers v. Scott County*, 868 F.2d 1017 (8th Cir. 1989) (adopting district court opinion and analysis); *see also Harpole v. Arkansas Dep't of Human Servs.*, 820 F.2d 923, 928 (8th Cir. 1987) (Title IV was "enacted to enable states to provide financial assistance to needy persons" and does not create enforceable rights).

The lower federal courts have also struggled with the issue, reaching strikingly different conclusions. In the Seventh Circuit alone, four district court judges were evenly split on the issue prior to the court of appeals decision in this case. *Compare B.H. v. Johnson*, 715 F. Supp. 1387, 1401-02 (N.D. Ill. 1989) (Grady, C.J.) (reasonable efforts clause too "amorphous" to create enforceable rights) *and Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1012 (N.D. Ill. 1989) (Williams, J.) (same) *with Norman v. Johnson*, 739 F. Supp. 1182, 1187 (N.D. Ill. 1990) (Hart, J.) (reason-

able efforts clause creates enforceable rights) *and Artist M,* App. 32a (N.D. Ill. 1989) (same).[2] These conflicting decisions evince a confusion in the lower courts as to the proper analysis for finding individually enforceable rights under Section 1983.

This Court should grant certiorari to resolve that uncertainty, which affects a substantial number of cases. Courts in several states are presently faced with "reasonable efforts" claims in Section 1983 actions. *See, e.g., Children ABCDEF v. Martinez,* No. 90-2416 (S.D. Fla. filed Oct. 1990); *M.E. v. Martinez,* No. 90-1008 (S.D. Fla. filed May 1990); *Baby Neil v. Casey,* No. 90-2343 (E.D. Pa. filed April 4, 1990); *LaShawn v. Dixon,* No. 89-1754 (D.C.D.C. filed June 20, 1989); *R.C. v. Hornsby,* No. 88-D-1170-N (M.D. Ala. filed Nov. 1988); *Del. A. v. Edwards,* No. 86-801 (E.D. La. filed January 1986). Moreover, the Seventh Circuit's erroneous analysis of Section 1983 will, if uncorrected, affect dozens of cases brought under spending-clause statutes each year. Review by this Court of the "reasonable efforts" issue will facilitate prompt resolution of these cases, by clarifying the governing legal principles for implication of enforceable rights from spending-clause statutes under Section 1983.

Without such clarification, the Seventh Circuit's holding will expose the states to massive financial obligations beyond the intended reach of the AAA and far beyond the scope of federal funding. That holding also will inject the federal courts into the minutiae of daily child welfare decision making, an area in which the federal courts have little knowledge or experience. Therefore, this Court should grant certiorari to clarify the proper scope of the AAA and Section 1983.

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[2]*See also Scrivner v. Andrews,* 816 F.2d 261, 263 (6th Cir. 1987) (recognizing enforceable procedural right to case plans and case reviews but not to meaningful visitation); *Winston v. Children & Youth Servs.,* 748 F. Supp. 1128, 1133 (E.D. Pa. 1990) (reasonable efforts provision does not create enforceable right to meaningful visitation); *R.C. v. Hornsby,* No. 88 D-1170-N, slip op. (M.D. Ala. Apr. 19, 1989) (finding enforceable rights under § 671(a)(15)).

I.

THE OPINION BELOW CONFLICTS WITH, AND HIGHLIGHTS THE NEED FOR CLARIFICATION CONCERNING, THIS COURT'S DECISIONS IN *PENNHURST* AND *WILDER*

In *Pennhurst*, 451 U.S. 1, this Court set limits on the otherwise unbridled power of the courts to create privately enforceable rights from federal-state cooperative funding statutes like the AAA. Those limits are essential to ensure that the states do not accept federal funds based on an agreement, or "contract," set out by Congress in the statute, only to have the courts transform that contract through creation of substantive individually enforceable rights never envisioned by Congress.

The Seventh Circuit's opinion in this case contravenes the restrictions set forth in *Pennhurst*. The majority's holding is based on an implicit assumption that this Court last term abandoned, or at least significantly reduced, *Pennhurst*'s authority in *Wilder*. That assumption is erroneous, and it leads to erroneous results. As Judge Manion's dissent recognizes, under *Pennhurst*, the AAA's "reasonable efforts" clause is too vague and amorphous to create enforceable rights. (App. 26a-27a).

As discussed fully in Part III, below, the Seventh Circuit's inability to reconcile *Pennhurst* and *Wilder* will, if left uncorrected, lead to a profound expansion of Section 1983 and to ever-increasing federal court intervention into areas of traditional state concern. That intervention is most troubling in this case, where the decision below allows every child who, under a state juvenile court order, is served by a state child welfare agency to sue the state in federal court any time the child (or his or her advocate) believes that the agency's efforts are not "reasonable." Without the boundaries set by *Pennhurst*, Section 1983 will become a vehicle for federalization of the child welfare system, a result absolutely unintended by the AAA's drafters, with disas-

trous consequences for the children and families involved. Those consequences in this case and a number of pending cases involving the AAA and other federal-state cooperative funding statutes make it necessary that the Court grant certiorari here to clarify the intended scope of *Wilder* and the continued strength of *Pennhurst*.

A. *Wilder* Reaffirmed *Pennhurst*, And The Opinion Below Conflicts With Both

By focusing solely on the result in *Wilder*, the Seventh Circuit's opinion in this case reaches a result that is flatly inconsistent with *Pennhurst* and misapplies the test for finding enforceable rights under Section 1983 set out in this Court's decisions. That test was clarified most recently in *Wilder* itself, 110 S. Ct. at 2517. *Cf. Dennis v. Higgins*, 59 U.S.L.W. 4117 (U.S. Feb. 20, 1991) (applying test in Commerce Clause case). Under *Pennhurst* and *Wilder*, a statute creates enforceable rights only if the statutory language is (i) mandatory *and* (ii) sufficiently specific so as not to be " 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.' " *Dennis*, 59 U.S.L.W. at 4120 (citations omitted); *see also Wilder*, 110 S. Ct. at 2517. The "reasonable efforts" clause of the AAA fails the second prong of that test.

In *Wilder*, this Court refined the analysis formulated in a series of opinions beginning with *Pennhurst*. As this Court held in *Pennhurst*, a federal-state cooperative funding statute like the AAA is

> in the nature of a contract; in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the contract.

Pennhurst, 451 U.S. at 17. The Court emphasized: "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accord-

ingly, if Congress intends to impose a condition on the grant of federal funds, it must do so unambiguously." *Id.*

The facts of *Pennhurst* illustrate this principle. In that case, this Court held that the asserted rights to "appropriate treatment" in the "least restrictive setting" were "largely indeterminate." *Id.* at 24. The Court noted:

> It is difficult to know what is meant by providing "appropriate treatment" in the "least restrictive" setting, and it is unlikely that a State would have accepted federal funds had it known it would be bound to provide such treatment. *The crucial inquiry, however, is not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice.*

Id. at 24-25 (emphasis added); *see also* App. 25a-26a (Manion, J., dissenting).

The Seventh Circuit majority here explicitly rejects this most important aspect of *Pennhurst* and fails to undertake the "crucial inquiry" required by this Court in that case and in *Wilder*. When Congress enacted the AAA, it chose to define certain terms specifically but provided no definition of or guidance concerning "reasonable efforts." *See* Part I(B)(1), below. The panel opinion discounts this fact, stating: "Congress is not required to spell out all rights intended to be created by a federal law merely because it chooses to spell out one." (App. 16a). Yet, if *Pennhurst* means anything, it means that Congress must spell out rights with sufficient specificity that the states know the contours of the bargain they are accepting.

The Seventh Circuit errs in attempting to distinguish *Pennhurst* solely on the basis that the "reasonable efforts" clause is mandatory. The majority opinion holds that *Pennhurst* is inapposite because the statutory provisions asserted in this case are "tied explicitly to the funding provision" of the AAA, in contrast to the terms of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6010, construed in *Pennhurst*.

(App. 11a). However, petitioners do not dispute that the AAA's language is mandatory; the issue is whether the language is sufficiently *specific* to create enforceable rights.

The dissenting opinion below recognizes the majority's error in failing to confront the second *Pennhurst* requirement:

> As with the language in *Pennhurst*, the phrase "reasonable efforts" does not communicate or prescribe any specific set of practices which unambiguously notify Illinois of the conditions it must meet in order to receive federal help. "Reasonable efforts" is an indeterminate statement, to say the least. . . . Subsection (a)(15) directs the plan to include provisions that "*in each case,* reasonable efforts will be made. . . . " Since every case will be different, "reasonable efforts" cannot be the same. . . . Without proper congressional guidance we should refrain from inventing rights which interfere with the foster care system.

(App. 26a-27a (Manion, J., dissenting) (emphasis in original)). By rejecting *Pennhurst*'s specificity requirement, the panel majority makes the federal courts a "crisis administrator of child welfare" (App. 29a-30a (Manion, J., dissenting)), a result inconsistent with congressional intent and this Court's decisions.

The Seventh Circuit's result is most easily explained by an implicit assumption that *Wilder* somehow modified or overruled *Pennhurst*'s specificity requirement. But, in fact, *Wilder* reemphasized that "crucial inquiry." *See Wilder*, 110 S. Ct. at 2517. This Court, in *Wilder*, cited *Pennhurst* repeatedly with approval. *See id.* at 2517-19. Indeed, *Wilder* makes explicit what is only implicit in *Pennhurst*: in determining whether a statute is sufficiently mandatory and specific, the courts must undertake a searching analysis of the statutory language, legislative history, and the corresponding regulatory scheme. *Id.* at 2518.

In *Wilder*, the Court conducted a detailed review of the Boren Amendment to the Medicaid Act, 42 U.S.C. § 1396(a), and concluded that the Amendment created an enforceable right to "reasonable and adequate" reimbursement rates for health care prov-

iders. Crucial to the Court's decision was the fact that the statute required the state to measure its rates against an "objective benchmark" of an "efficiently and economically operated facility," thereby reducing any lack of specificity. *Id.* at 2522-23.[3] Likewise, the legislative history of the Amendment contained specific statements of an intent to create privately enforceable rights. *Id.* at 2520-21. In addition, the regulations implementing the Amendment set out factors that a state must consider in determining the method for calculating "reasonable" rates. *Id.* at 2522-23. Together, these factors led to a finding that Congress intended that the Amendment be privately enforced.

Instead of undertaking the "crucial inquiry" set out in *Pennhurst* and *Wilder,* the Seventh Circuit panel mechanically analogizes "reasonable efforts" to the "reasonable and adequate" reimbursement rates to health care providers at issue in *Wilder.* (App. 11a). The panel majority fails, however, to undertake the *analysis* required by *Wilder* and the majority's strained analogy ignores substantial differences in the statutory schemes. *See* Part I(B), below. Thus, the Seventh Circuit's confusion over the relationship between *Pennhurst* and *Wilder* leads the court to discard *Pennhurst*'s careful limits on federal court power to "invent" new rights and distort the enforceable-rights test set out by this Court's prior decisions.

B. It is Clear Under The Inquiry Required By *Wilder* And *Pennhurst* That The "Reasonable Efforts" Clause Does Not Create Enforceable Rights

As set forth above, the two-pronged test outlined in *Pennhurst* and *Wilder* requires that the courts divine congressional intent

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[3]By contrast, the Seventh Circuit's opinion in this case admits that, in enacting the AAA, Congress meant to give the states "*substantial discretion* in choosing the method of implementation." (App. 12a (emphasis added)). As discussed in Part I(B), below, that "substantial discretion" distinguishes the "reasonable efforts" clause from the Boren Amendment considered in *Wilder* and brings this case directly within the ambit of *Pennhurst.*

from an examination of the statutory structure, legislative history, and regulatory framework. *See, e.g., Wilder*, 110 S. Ct. at 2518. If the Seventh Circuit had not strayed from the "crucial inquiry" required by this Court, the court would have found that the "reasonable efforts" clause lacks the required specificity to create individually enforceable rights. The AAA does not contain the required detailed statutory directive, legislative history indicating Congress' intent to create specific, enforceable rights, and regulatory framework providing the states with definition and guidance as to what Congress meant by "reasonable efforts."

1. Statutory Structure

Perhaps the most powerful evidence that the "reasonable efforts" clause is too vague to be judicially enforced is the AAA itself. In *Wilder*, this Court found that the requirement of "reasonable and adequate" reimbursement rates was sufficiently precise because the statute itself required the state "to judge the reasonableness of its rates against the objective benchmark of an 'efficiently and economically operated facility.' " *Wilder*, 110 S. Ct. at 2522-23.[4]

[4]This Court in *Wilder* noted that the Boren Amendment provided more guidance than the Brooke Amendment to the Housing Act of 1937, 42 U.S.C. § 1437a, which was held enforceable in *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987). In *Wright*, the Court found that the Brooke Amendment created an enforceable right to a "reasonable" rent allowance, in part because the implementing regulations set out guidelines to determine that allowance. *Id.* at 432.

As in *Wilder*, *Wright* involved a *monetary* calculation that was easily determined based on prevailing rates in the market. By contrast, there is no single "reasonable" child welfare practice. The area is one of complex problems and individualized determinations not capable of reduction to a formula or "benchmark." *See* App. 24a (Manion, J., dissenting) ("A state's duty to exert 'reasonable efforts' in general does not suggest any particular obligation. In contrast, a court can easily determine and enforce a state's obligation to establish 'reasonable' reimbursement rates, or provide for 'reasonable' utility allowances. . . .").

In drafting the AAA, Congress did not even *attempt* to formulate an "objective benchmark" like that in *Wilder*. Instead, the statute requires that "reasonable efforts" be determined on a case-by-case basis. *See* § 671(a)(15) ("*in each case,* reasonable efforts will be made"). Rather than establishing a specific requirement tied to an objective benchmark, Congress intentionally chose vague language and specifically acknowledged that "reasonable efforts" vary based on the facts of each individual case. *See* App. 27a (Manion, J., dissenting).

Indeed, the AAA never defines or limits "reasonable efforts" in any respect.[5] An analysis of the AAA's overall statutory structure demonstrates that Congress was capable of being specific and detailed when it so intended. In contrast to the ambiguity surrounding the "reasonable efforts" clause, Congress set out specific, detailed definitions of the "case plan" and "case review system" required under Section 671(a)(16). *See* 42 U.S.C. § 675(1), (5). The heart of this Court's holding in *Pennhurst* is the premise that Congress must speak so clearly that "we can fairly say that the state could make an informed choice." *Pennhurst*, 451 U.S. at 25. Congress' refusal to provide a clear directive as to "reasonable efforts" is a powerful indication that neither Congress nor the states envisioned that the statute created an enforceable right to reasonable efforts.

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[5]Because the AAA contains no specific definition or regulations defining "reasonable efforts," the court of appeals and district court in this case improperly determined what Congress intended by the term "reasonable efforts" by reference to DCFS's own voluntary actions. The Seventh Circuit latched onto the fact that "DCFS chose to use caseworkers" (App. 11a) to justify a *requirement* that DCFS assign caseworkers immediately and continuously to all court cases. That "requirement," and indeed the very concept of caseworkers, appears nowhere in the AAA. In fact, the Seventh Circuit's mode of analysis leads to the anomalous result that *federal* law creates different rights in different states, a result directly contrary to the "contract" theory of *Pennhurst.*

2. Legislative History

In *Wilder,* this Court cited extensive legislative history showing that Congress intended to enact a specific requirement for reasonable and adequate reimbursement rates and that Congress had explicitly and repeatedly stated that it intended for Medicaid providers to retain the right to sue state agencies. *See Wilder,* 110 S. Ct. at 2520-22. By contrast, the legislative history of the "reasonable efforts" clause strongly supports petitioners' claim that Congress never intended to create an enforceable right to reasonable efforts; rather, it is apparent from the legislative history that Congress meant to *encourage* rather than *mandate* the provision of preventive and reunification services.[6] *Cf. Vermont Dep't of Social & Rehabilitation Servs. v. United States Dep't of Health & Human Servs.,* 798 F.2d 57, 59 (2d Cir. 1986) (AAA creates "fiscal incentives to encourage a more active and systematic monitoring of children in the foster care system"), *cert. denied,* 479 U.S. 1064 (1987). As the Seventh Circuit dissent notes: "Incentives in this case do not create rights and binding obligations." (App. 27a (Manion, J., dissenting)).

The House Ways and Means Committee Report on the AAA specifically stated:

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[6]*See* 125 Cong. Rec. 22683 (Aug. 3, 1979) (remarks by Sen. Cranston) ("Under the fiscal constraints proposed in the ceiling to be imposed by this legislation, States will be encouraged to place in foster care only those children whose removal from their families is clearly necessary."); 125 Cong. Rec. 22692 (Aug. 3, 1979) (remarks by Sen. Moynihan) ("Insofar as it is within the limited abilities of the Federal Government to encourage the return of youngsters to their homes or their adoption, our policies should be so shaped"); S. Rep. No. 336, 96th Cong., 2d Sess. ("S. Rep.") 1, *reprinted in* 1980 U.S. Code Cong. & Admin. News ("USCCAN") 1448, 1450 ("the incentive structure of present law is modified to lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes"); S. Rep. at 16, *reprinted in* 1980 USCCAN at 1466 (recognizing that progress in restructuring foster care system "cannot be achieved by 'Federal fiat,' but only through state governments, "which have primary responsibility for these programs").

> The Committee recognizes that the entire array of possible preventive services are not appropriate in all situations. *The decision as to the appropriateness of specific situations will have to be made by the administering agency having immediate responsibility for the care of the child.*

H.R. Rep. No. 96-136, 96th Cong., 1st Sess. 47 (1979) (emphasis added). It is clear from this statement that Congress intended for the states to retain the flexibility to determine what efforts should be made in each case, rather than to create a federal judicially-enforceable right to "reasonable efforts."

3. Regulatory Framework

This Court's decisions also direct the courts to look to the regulatory framework of the statute for additional guidance and definition. For example, in *Wright,* the Court found that the implementing regulations set out specific guidelines for housing authorities to follow to determine a reasonable utility allowance, thereby creating a sufficiently specific and definite right. *Wright,* 479 U.S. at 432; *see also Wilder,* 110 S. Ct. at 2522-23 & n.17.

The regulations implementing the AAA, 45 C.F.R. § 1357.15(e)(2), which the Seventh Circuit only briefly mentions, do nothing more than list examples of the type of preventive or reunification services that the states *may* provide. The regulations themselves state that the list is not meant to be all-inclusive. *Id.* They give the states no guidance as to which services constitute "reasonable efforts" in any particular case. Again, such regulations in no way make the "reasonable efforts" clause more specific.

The Seventh Circuit's failure to undertake the "crucial inquiry" required by *Wilder* and *Pennhurst* thus led the Court to the wrong result in this case. The court's holding and paucity of analysis evince a need for clarification by this Court that *Pennhurst* survives *Wilder* intact, and that the courts must undertake a detailed analysis of statutes when confronted with offers to create expansive new rights from congressional silence.

II.

THE SEVENTH CIRCUIT OPINION CONFLICTS WITH *PENNHURST* BY HOLDING THAT THE AAA CREATES ENFORCEABLE RIGHTS ON BEHALF OF CHILDREN FOR WHOM STATES RECEIVE NO FEDERAL FUNDS UNDER TITLE IV-E

As discussed in Part I, one of *Pennhurst*'s central concepts is the notion that federal-state cooperative funding statutes are "contracts." As this Court described the contract, "*in return for federal funds,* the State agrees to comply with federally imposed conditions." *Pennhurst,* 451 U.S. at 17 (emphasis added). In this case, however, the Seventh Circuit discards that fundamental principle and creates enforceable rights on behalf of a class of citizens for whom the states receive not one dollar of federal reimbursement under Title IV-E of the AAA. This Court should grant certiorari to emphasize that, in the case of federal-state cooperative funding statutes, there are no rights without fiscal support.

In one brief paragraph, the court of appeals extends an enforceable right to "reasonable efforts" to children residing at home, for whom the state receives *no* federal Title IV-E funds.[7] (App. 18a). Section 671(b) of the AAA provides that states may receive reimbursement for "*foster care maintenance payments*" in return for meeting the requirements, including "reasonable efforts," set forth in Section 671(a). Those payments are made only on behalf of children who reside in a "child care institution" or a "foster

[7]That holding for the first time extends rights under the AAA beyond children in state custody.

family home." *See* § 672(b). The statute's implementing regulations explicitly limit "foster family home" to children living outside of the home. 45 C.F.R. § 1355.20 (foster family home "provides 24-hour *out-of-home* care for children" (emphasis added)). Thus, the state receives no federal funds under Title IV-E for providing services to children in their own homes.

Nonetheless, the Seventh Circuit holds that such children have enforceable rights under Title IV-E. That holding conflicts directly with the *Pennhurst* requirement that the court consider whether the state receives federal funds in determining whether Congress meant to create enforceable rights:

> The fact that Congress granted to Pennsylvania only $1.6 million in 1976, a sum woefully inadequate to meet the enormous financial burden of providing "appropriate" treatment in the "least restrictive" setting, confirms that Congress must have had a limited purpose in enacting § 6010. *When Congress does impose affirmative obligations on the States, it usually makes a far more substantial contribution to defray costs.*

Pennhurst, 451 U.S. at 24.[8]

The Seventh Circuit refuses even to acknowledge this aspect of *Pennhurst,* thereby creating a situation where federal courts may infer that Congress created rights on behalf of people for whom the states receive no federal dollars. If that holding is correct, then the bedrock foundation of enforceable-rights law—that spending-clause statutes are contracts imposing specific obligations in return for funding those obligations—has been fundamentally altered. Nothing in *Wilder* compels such a result, and this Court should grant certiorari to clarify that plaintiffs may not ask the judiciary, in the guise of enforcing federal funding statutes through Section 1983, to force states to fund what Congress has not.

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[8]Indeed, this Court in *Wilder* also recognized the importance of considering the amount of federal funds a state receives, noting that "the Federal Government provides funds to cover between 50% and 83% of the cost of patient care." 110 S. Ct. at 2518 n.10.

III.

SUPREME COURT REVIEW IS NECESSARY TO CLARIFY THE EFFECT OF *WILDER* ON THIS COURT'S PRIOR RULINGS AND TO PREVENT A VAST, UNINTENDED EXPANSION OF FEDERAL INTRUSION INTO STATE CHILD WELFARE DECISIONS

As discussed at length above, the Seventh Circuit's decision in this case evidences an apparent confusion as to the scope of the recent *Wilder* decision. Specifically, the Seventh Circuit majority reads *Wilder* as having greatly reduced the precedential force of *Pennhurst*, this Court's leading case on Section 1983 enforceable rights. As discussed earlier, such an interpretation is inconsistent with *Wilder* itself, which cites *Pennhurst* approvingly.

Moreover, such a reading of *Wilder* creates a vast expansion of federally enforceable rights. *Pennhurst* placed clear limits on the ability of federal courts to impose massive financial burdens on the states in the guise of construing federal spending-clause statutes. Specifically, if a court wishes to infer that Congress intended to allow individual enforcement, the court must examine "whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." *Pennhurst*, 451 U.S. at 24-25. Likewise, the absence of federal funding for a purported "right" rebuts any inference that Congress intended to create that right. *Id.* at 24.

The Seventh Circuit majority in this case turns *Pennhurst* on its head. No longer does Congress have to define terms with some degree of specificity, so that the states may understand the "contract" they enter when accepting federal reimbursement. No longer does Congress even have to provide a penny of federal funding in order for courts to create enforceable rights from a spending-clause statute.

Judge Manion, in dissent, illuminates the unprecedented scope of the majority's opinion:

> The right that we have created in this opinion will allow every child, by his next friend, to challenge the reasonable efforts of the caseworker . . . . With this court's approval of the district court's finding that each of these children have an individual enforceable right to challenge the reasonable efforts of the DCFS, we can anticipate an avalanche of lawsuits seeking to obtain specific social services and mandatory injunctions governing every imaginable detail over the operation of the DCFS. Clearly this is far beyond the intent of Congress.

(App. 29a (Manion, J., dissenting)).

By abolishing *Pennhurst's* sound restrictions *sub silentio*, the court of appeals removes virtually all constraints upon the power of federal courts to "invent[ ] rights" from congressional silence. *See* App. 27a (Manion, J., dissenting). The federal courts may now effectively rewrite statutory agreements between Congress and the states, without any indication that either party intended or foresaw that outcome. Nothing in *Wilder* compels that result. The Court should grant certiorari in this case to reaffirm the tenets of *Pennhurst* and reestablish the limited scope of federal court power to create sweeping rights almost from whole cloth.

Such clarification is especially necessary in this case, where the court of appeals' decision may have disastrous consequences for the states and the children they serve. As the dissent below notes, the Seventh Circuit's decision makes the federal courts the "crisis administrators of child welfare" (App. 29a-30a (Manion, J., dissenting)), and will create an "avalanche" of individual federal lawsuits seeking substantive child welfare services (App. 29a).

That "avalanche" is one for which the federal courts are wholly unprepared and ill-suited. In *DeShaney v. Winnebago County De-*

partment of Social Services, 812 F.2d 298 (7th Cir. 1987), *aff'd,* 109 S. Ct. 998 (1989), Judge Posner recognized:

> [T]he proposition that by once assuming custody of a child a state becomes obligated by federal law to act with some minimum competence in overseeing the child's welfare would if accepted inject the federal courts into an area in which they have little knowledge or experience: that of child welfare. Balancing the rights of parents with those of their children is a task as difficult as it is delicate, and we doubt that it will be performed better under the eyes of federal courts . . . than by the state judicial and administrative authorities.

Id. at 304.

By misreading *Pennhurst* and *Wilder*, the court below creates the proverbial loose cannon, slashing to and fro without aim, upsetting both the careful federalism of the AAA's incentive funding structure and the delicate balance of child welfare decision making. This Court should grant certiorari to clarify that *Pennhurst* survives *Wilder*, right the wrong done in this case, and prevent such mistakes in the future.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioners Sue Suter and Gary T. Morgan respectfully ask that this Court grant the writ of certiorari, vacate the opinion of the United States Court of Appeals for the Seventh Circuit, and remand for dismissal of the case.

Respectfully submitted,

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Dated: March 20, 1991

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 90-1742 and 90-1764
ARTIST M., *et al.*,
Plaintiffs-Appellees,
v.
GORDON JOHNSON and
GARY T. MORGAN,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 10503—Milton I. Shadur, *Judge.*

ARGUED JUNE 20, 1990—DECIDED OCTOBER 29, 1990

Before CUMMINGS and MANION, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

CUMMINGS, *Circuit Judge.* The plaintiffs in this class action suit allege that the Department of Children and Family Services (the "DCFS"), an agency of the State of Illinois, fails to assign caseworkers to members of their class in a timely manner and that this violates the federal Adoption Assistance and Child Welfare Act of 1980 (the "AAA").[1] Defendants Gordon Johnson and Gary Morgan are director and guardianship administrator, respectively, of the DCFS. They appeal from the entry of a preliminary injunction and enforcement order requiring them to adhere to the AAA's minimum requirements in several specific respects, and from the denial of their motion to dismiss the complaint.[2] We affirm.

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[1] The AAA is incorporated in Title IV, Parts B and E, of the Social Security Act. 42 U.S.C. §§ 620-628, 670-679(a).

[2] Allegations of violations of the federal Constitution are no longer part of this case. The district court granted defendants' motion to dismiss plaintiffs' due process claim and there has been no cross-appeal. See n.5 *infra.*

I. Procedural Background

The DCFS[3] and the State's Attorney's Office screen reports of abused, neglected, or dependent children and, on the basis of some of those investigations, the DCFS files petitions in the Juvenile Division of the Circuit Court of Cook County, Illinois ("Juvenile Court"). Following Juvenile Court hearings, some of the subjects of those petitions become wards of the Juvenile Court under the supervision of the DCFS. In some cases the Juvenile Court will award temporary custody of the child to the DCFS as custodian and in others the child will be returned to the custody of his or her parents under protective order.

Plaintiffs, wards of the Juvenile Court, filed this class action in December 1988 for alleged violations of the AAA by the DCFS. The class and a subclass were certified pursuant to Fed. R. Civ. Pro. 23(c)(1) shortly after suit was filed. Class A is composed of all children who are or will be subjects of Juvenile Court petitions, who are or will be in the custody of DCFS (or in a home under DCFS supervision) by an order of the Juvenile Court, and who are or will be without a DCFS caseworker for a significant period of time. Class B, the subclass, is identical to Class A except that Class B does not include children who are in a home under DCFS supervision by order of the Juvenile Court.

Plaintiffs allege that the DCFS violates the rights of class members by failing promptly to assign caseworkers to children under protective or supervisory court orders and also by failing promptly to reassign cases when a caseworker goes on leave, is terminated, or resigns. *Artist M. v. Johnson,* 726 F. Supp. 690, 692 (N.D. Ill. 1989). These alleged policies and practices of the DCFS

[3] For convenience, we follow the district court's latest memorandum opinion in referring to the defendants collectively as the DCFS. A state official sued for injunctive relief in his or her official capacity is a "person" for the purposes of a Section 1983 action, and therefore the plaintiffs' suit is not barred by the Eleventh Amendment. *Will v. Michigan Dep't of State Police,* 109 S. Ct. 2304, 2311 n.10.

purportedly violate Sections 671(a)(9), (a)(15), and (a)(16) of the AAA.[4] The plaintiffs assert that failure to assign caseworkers or to ensure that caseworkers hand off cases to each other promptly contributes to unnecessary abuse, neglect, and disintegration of families. Cast in terms of the AAA's requirements, the plaintiffs specifically allege that the DCFS fails to: (1) make "reasonable efforts" to prevent the removal of children from their homes, (2) make "reasonable efforts" to reunify with their families those children who have been removed from their homes, (3) notify appropriate agencies when a child is mistreated while placed in another home, and (4) develop case plans to assure proper services are provided to children while in placement. *Artist M.*, 726 F. Supp. at 696 n.8.

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[4] Section 671 states in relevant part (with emphasis supplied for a phrase that has become a focus of this case):

§ 671. State plan for foster care and adoption assistance

(a) Requisite features of State plan

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—

* * *

(9) provides that where any agency of the State has reason to believe that the home or institution in which a child resides whose care is being paid for in whole or in part with funds provided under this part or part B of this subchapter is unsuitable for the child because of the neglect, abuse, or exploitation of such child, it shall bring such condition to the attention of the appropriate court or law enforcement agency;

* * *

(15) effective October 1, 1983, provides that, in each case, *reasonable efforts* will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return home;

(16) provides for the development of a case plan (as defined in section 675(1) of this title) for each child receiving foster care maintenance payments under the State plan and provides for a case review system which meet [sic] the requirements described in section 675(5)(B) of this title with respect to each such child; * * *.

Plaintiffs sued the DCFS under 42 U.S.C. § 1983, under the AAA directly, and under the Due Process Clause of the Fourteenth Amendment.[5] Defendants moved under Fed. R. Civ. Pro. 12(b)(6) for dismissal for failure to state a claim upon which relief could be granted. On November 21, 1989, Judge Shadur dismissed Class B plaintiffs' due process claim but denied the motion in all other respects, holding that plaintiffs could maintain a cause of action under Section 1983 as well as directly under the AAA. *Artist M.*, 726 F. Supp. at 696-697.

Thereafter the district court held a hearing with respect to the plaintiffs' request for injunctive relief. On March 2, 1990, the district court entered a preliminary injunction enjoining the DCFS from failing to assign a caseworker to plaintiffs within three working days of the time the case is first heard in Juvenile Court and from failing to reassign a caseworker within three working days after a previously assigned caseworker relinquishes any portion of the case. On April 3, 1990, the court amended the injunction by entering an order designed to monitor DCFS compliance with its terms.[6] The DCFS filed timely notices of appeal seeking review of the injunctive orders dated March 2 and April

[5] Although the district court found that in some circumstances Class B plaintiffs might properly maintain a due process clause action against defendants, it dismissed this claim because those plaintiffs failed to allege complete indifference on the part of defendants. *Artist M.*, 726 F. Supp. at 700. This portion of the November 1989 order is not before this Court. The district court observed that if Class A plaintiffs had asserted due process claims, they would have been barred by *De Shaney v. Winnebago Co. Dep't of Social Servs.*, 489 U.S. 189 (state's failure to protect child from father's abuse did not violate child's substantive due process rights). *Artist M.*, 726 F. Supp. at 699 n.14.

[6] The April 3, 1990, order established a weekly reporting mechanism for compliance with the March 2, 1990, preliminary injunction. Every Friday, the DCFS must provide the Office of the Public Guardian (counsel for plaintiffs) with a list of all of the class members whose cases have just entered Juvenile Court or who have recently lost their caseworker, along with the names of involved caseworkers and relevant dates of commencement or completion of assignments.

3, 1990,[7] as well as the November 21, 1989, order disposing of the DCFS motion to dismiss.

After hearing oral argument, this Court entered an order on June 21, modified on June 27, partially remanding this cause to the district court. The district court was to make factual findings regarding the nature of delays in caseworker assignments and the progress of DCFS reforms as they existed at the time the district court issued its March 2, 1990, injunction order. In light of the fact that the DCFS had voluntarily instituted a Reorganization Plan that could have affected the concerns addressed by plaintiffs, the district court was requested to make findings with respect to the extent of delay in caseworker assignment and reassignment at the time the injunction order issued.

After receiving submissions on these questions from the parties, the district court issued its memorandum opinion and findings on July 25, 1990. It is evident that the findings reflect the status of relevant DCFS activities at the time the injunction order issued because by agreement of the parties, the February 1990 logs of the DCFS regarding caseworker assignment were made an exhibit to a stipulated submission to the district court and the January and February activities of the DCFS were closely scrutinized by the district court.

The findings strongly support the district court's decision to issue an injunction. We will not attempt here to summarize these detailed findings, which are heavily cited to specific sources in the record. The district court reached the following conclusions: (1) the DCFS failed to show that its Reorganization Plan, begun

[7] The parties dispute the appealability of the April 3, 1990, order in which Judge Shadur modified the terms of the preliminary injunction entered March 2, 1990. The order of April 3 provided the district court with a mechanism to monitor defendants' compliance with the substantive portions of the injunction. This order is appealable pursuant to 28 U.S.C. § 1292(a)(1) as an order modifying the terms of an injunction. Accordingly, this Court has jurisdiction to review the terms of that order.

during the summer of 1988 and purportedly completed by July 16, 1989, moved the agency closer to the "reasonable efforts" required by the AAA[8]; (2) the DCFS demonstrated "a total lack of credibility" by pledging to make such changes and then failing to take effective steps to fulfill that pledge.[9]

II. The Adoption Assistance and Child Welfare Act of 1980

In 1980 Congress enacted the AAA as an amendment to the Social Security Act. 42 U.S.C. §§ 620-628, 670-679(a). It was in part an effort to "lessen the emphasis on foster care placement and * * * encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes." S. Rep. No. 96-336, reprinted in 1980 U.S. Code Cong. & Admin. News 1448, 1450 (96th Cong., 2d sess.). It sought to achieve those goals by providing states with "incentives to encourage a more active and systematic monitoring of children in the foster care system." *Vermont Dep't of Social and Rehab. Servs. v. United States Dep't of Health and Human Servs.*, 798 F.2d 57, 59 (2d Cir. 1986), certiorari denied, 479 U.S. 1064. These goals are particularly evident in the requirement discussed below that states must make "reasonable efforts" to prevent the need for removal of children from their homes and to make it possible for children who have been taken from their homes to return to their homes. 42 U.S.C. § 671(a)(15).

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[8] Findings bearing on this point are Numbers 21-37. For example, the total number of unassigned cases jumped from 232 on June 30, 1989, to 404 by year's end and the number of cases unassigned for over 30 days doubled over the same period of time. Finding 36.

[9] Findings bearing on this point are found at p. 3 n.5 and p. 15 n.10 of the court's memorandum, as well as in Findings Numbers 28-37. To cite only one example, the two officials to whom DCFS entrusted oversight of one aspect of its alleged remedies reviewed the program only two times during 1989. Finding 29.

The provisions of the AAA are codified in two separate parts of Title IV of the Social Security Act. Title IV-B provides funds to the states for the improvement of child welfare services. 42 U.S.C. §§ 620-628. Title IV-E provides reimbursement to the states for foster care maintenance and adoption assistance payments made by the states on behalf of eligible children. 42 U.S.C. §§ 670-679(a). Federal funding is provided under the Title IV-B program for child welfare services "which are directed toward the accomplishment" of a list of enumerated purposes, which include the following: "preventing the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing breakup of the family where the prevention of child removal is desirable and possible"; "restoring to their families children who have been removed, by the provision of services to the child and the families"; and "assuring adequate care of children away from their homes, in cases where the child cannot be returned home or cannot be placed for adoption." 42 U.S.C. § 625(a)(1)(C), (D), (F).

Section 622 of Title IV-B sets forth various features state plans must possess in order to be eligible for payments for these child welfare services. Additional funds may be allocated to a state that, among other conditions irrelevant for purposes of this appeal, implements a "case review system" for each child receiving foster care under the supervision of the State and a "service program." Service programs are to help children, where appropriate, return to families from which they have been removed or be placed for adoption or legal guardianship. 42 U.S.C. § 627(a)(2)(B), (C).[10] Failure of a state to maintain a plan in

[10] See also the examples listed by the Secretary of Health and Human Services as steps that may be taken toward compliance with Sections 627(a)(2)(C) and 427(b)(3). 45 C.F.R. § 1357.15(e)(2) (1989) (listing such measures as crisis counseling, drug and alcohol abuse counseling, and provision of temporary child care as potential elements in programs to permanently place children, if possible back with their own families).

compliance with any requirement established in Section 627 may result in the termination or reduction of funds. 42 U.S.C. § 627(b).

Turning to Title IV-E, Section 671 lists explicit requirements, strikingly similar to those found in 42 U.S.C. § 627(a)(2)(B) and (C) outlined above, with which the state must comply in order to be eligible for funding. 42 U.S.C. § 671(a)(16). As set out in footnote 4 of this opinion, Section 671(a)(15) mandates that the state plan must provide "that, in each case, reasonable efforts will be made * * * to prevent or eliminate the need for removal of the child from his home, and * * * to make it possible for the child to return to his home." Likewise, Section 671(a)(16) requires that the plan provide for the development of a "case plan" and "case review system," the elements of which are given in Section 675(1) and Section 675(5)(B), respectively. A case plan, for example, is defined as a written document that among other things includes a plan for assuring that services are provided to facilitate the return of the child to his own home or the permanent placement of the child. 42 U.S.C. § 675(1)(B). The final provision relevant to this appeal, Section 671(a)(9), requires that the plan provide for the reporting of unsuitable living conditions to law enforcement officials.

III. The November 1989 Order

Although the November 21, 1989, order denying the bulk of the DCFS motion to dismiss is not immediately appealable by itself, this Court may review that order in connection with the injunction if the injunction turns on the validity of that order, *Elliott v. Hinds,* 786 F.2d 298, 301 (7th Cir. 1986), or if the dismissal order is so entwined with the injunction order that judicial economy compels review. *Asset Allocation & Mgt. Co. v. Western Employers Ins. Co.,* 892 F.2d 566, 568-569 (7th Cir. 1989); *Parks v. Pavkovic,* 753 F.2d 1397, 1402 (7th Cir. 1985),

certiorari denied, 473 U.S. 906, 474 U.S. 918-919. Because evaluation of the likelihood of success turns as an initial matter on whether plaintiffs may maintain a cause of action against the DCFS under 42 U.S.C. § 1983 or directly under the AAA, the Court will reach the merits of the November order, which addressed those issues. We employ a *de novo* standard in reviewing these legal determinations. Because each of the lower court's legal conclusions regarding Section 1983 and an implied private right of action under the AAA requires a slightly different inquiry, they will be addressed separately. See *Boatowners and Tenants Ass'n, Inc. v. Port of Seattle,* 716 F.2d 669, 674 (9th Cir. 1983).

A. *Section 1983 Action*

Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. A plaintiff may pursue a cause of action under Section 1983 for violations of a federal statute. *Maine v. Thiboutot,* 448 U.S. 1, 4 (violations of Social Security Act enforceable under the "and laws" provision of Section 1983). Yet the Supreme Court recently reiterated that no action will lie if the statute does not create enforceable "rights, privileges or immunities" within the meaning of Section 1983 or if Congress foreclosed this avenue of relief in the enactment itself. *Wilder v. Virginia Hospital Ass'n,* 110 S. Ct. 2510, 2517. Though plaintiffs must point to a substantive provision that gives them a tangible right, privilege, or immunity, the burden is on the defendants to demonstrate that Congress intended to foreclose private enforcement of a right that is otherwise evident. *Wright v. City of Roanoke Redevelopment and Housing Auth.,* 479 U.S. 418, 423-424 (" 'We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally secured right") (quoting *Smith v. Robinson,* 468 U.S. 992, 1012).

1. Existence of an Enforceable Right.—A statute will not be found to have created an enforceable right unless the provision in question is intended to benefit the plaintiff, the provision imposes a binding obligation on the state, and the right is not so amorphous that courts are unable to adequately enforce it. *Wilder,* 110 S. Ct. at 2517. The majority held in *Wilder* that an amendment to the Medicaid Act providing for "reasonable and adequate" reimbursement rates for health care providers creates an enforceable right under Section 1983. The Court found that the amendment was intended to benefit the health care providers, represented a binding obligation on the state of Virginia, and was not relied upon by the health care providers to pursue overly vague or amorphous interests. *Wilder,* 110 S. Ct. at 2517-2523.

The DCFS asserts that the "reasonable efforts" clause of Section 671(a)(15) fails in each of these respects and that therefore the clause does not provide plaintiffs with a right enforceable under Section 1983. That Congress enacted the AAA to benefit children such as those in the plaintiff classes cannot be seriously disputed. The Act's stated purposes are to strengthen assistance for needy children, improve welfare services, and aid families with dependent children. Both classes of plaintiffs consist of children who receive services pursuant to plans implemented by the state in accordance with the AAA and who, aside from parents, are the only direct beneficiaries of the Act's provisions.

In determining whether a federal enactment imposes a binding obligation on a state, courts look to "the context of the entire statute and its legislative history" for such congressional intent. *Wilder,* 110 S. Ct. at 2518; *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 13. The provisions sought to be enforced here are located in the Section setting forth in mandatory language the features a state plan must possess before funding will be provided. §§ 671(a)(9), (a)(15), (a)(16). When the right asserted is tied explicitly to the funding provision, the Supreme Court has found the requisite congressional intent. *Wilder,* 110

S. Ct. at 2519-2520 (funding conditioned on state setting reasonable and adequate rates created enforceable right under the Boren Amendment); *Wright,* 479 U.S. at 424 (regulation requiring reasonable allowance for utilities as condition for receiving federal funds created enforceable right under Brooke Amendment); but see *Pennhurst,* 451 U.S. at 13 (right to be placed in least restrictive environment did not create enforceable right under Developmentally Disabled Assistance and Bill of Rights Act of 1975, in part because right not tied explicitly to funding provision). Because the rights asserted here are tied indisputably to the funding provision the case is readily distinguishable from *Pennhurst* and, consequently, the AAA obligations are binding on the state.

Finally, this Court must determine whether the asserted rights are sufficiently explicit that the pertinent clauses are judicially enforceable. *Wilder,* 110 S. Ct. at 2517. The district court rejected the DCFS challenge on this ground based on the fact that courts routinely enforce contractual clauses which mandate that the parties exert "best" or "reasonable" efforts in complying with the terms of the contract. *Artist M.,* 726 F. Supp. at 695 n.6. In *Wilder,* the Supreme Court stated that simply because a provision gives the state great latitude in promulgating a "reasonable and adequate" rate does not render the provision unenforceable for vagueness. Instead, once the state exercises its discretion to select a method of calculating rates a court is still capable of determining whether the rate itself is reasonable in light of the method chosen. *Wilder,* 110 S. Ct. at 2522-2523. This same reasoning is applicable here. The Act requires that the state implement a plan that provides for reasonable efforts directed at preventing the removal of a child from home or, if the child is removed, to return the child to his family. 42 U.S.C. § 671(a)(15). The DCFS chose to use caseworkers as the means through which these services are provided. The DCFS concedes that although a caseworker does not herself provide services, caseworkers are necessary to arrange for the provision of services by others (Plaintiffs' Br. at 18). The

caseworker is a "lifeline." When the caseworker is absent, no efforts can be exerted for preventive and reunification services. See District Court's July 25, 1990, Findings, Findings 4-12.

Just as the Supreme Court in *Wilder* acknowledged that the State of Virginia had substantial discretion to choose the method it would use in calculating reimbursement to health care providers, so the DCFS has substantial discretion in choosing the method it will use to implement the requirements of the AAA. The judiciary is nevertheless capable of determining whether the state is exerting "reasonable efforts" to provide those services. The DCFS therefore cannot maintain that even if Section 671(a)(15) gives rise to an enforceable right, that right cannot be said to encompass a right to expeditious caseworker assignments. Instead, a court may evaluate the reasonableness of the efforts to secure those services by looking to the caseworker assignment process. As discussed in more detail below in Section IV, based on the district court's factual determination that DCFS fails to exert reasonable efforts to provide services mandated by the Act, the district court could order the remedy found in the preliminary injunction, namely expeditious assignment of caseworkers, to remedy that deficiency.

The district court rejected a request from the plaintiffs for a more stringent remedy, which called for the mandatory assignment of a caseworker to each of the plaintiffs and their families within 24 hours after the Juvenile Court places them in the temporary custody of the DCFS or returns them home under the supervision of the DCFS. The district court has also not attempted to fashion a remedy that interferes with the daily operations of the DCFS. Compare *L.J. ex rel. Darr v. Massinga,* 838 F.2d 118, 119-120 (4th Cir. 1988) (affirming broad interim and permanent injunctive relief, including expansion of medical relief to children), certiorari denied, 109 S. Ct. 816; see also *B.H. v. Johnson,* 715 F. Supp. 1387, 1402 (N.D. Ill. 1989) (plaintiffs requesting on the basis of AAA standards "sweeping duties" such

as an adequate number of caseworkers, family reunification services, services to "troubled families," or rights of meaningful visitation between siblings). It is important to note that the three-day requirement fits the estimate given by the DCFS itself of how quickly it would assign caseworkers under its promised reforms (Preliminary Inj. at 6). This makes it difficult for the DCFS to argue that a requirement of "reasonable efforts" is too ambiguous to be enforceable. The district court sought out and discovered a method of enforcing the "reasonable efforts" requirement that is tailored to DCFS practices. In this way, the district court has refrained from injecting itself into the operations of the DCFS any further than is required by the federal right that is enforceable under Section 1983.

As the Fourth Circuit held, after reviewing an action under Section 1983 for the enforcement of rights created by the same provisions at issue here:

> Taken together we think that these statutory provisions spell out a standard of conduct, and as a corollary[,] rights in plaintiffs, which plaintiffs have alleged have been denied. It is true that the statutes are largely statutes relating to appropriations, but defendants' argument to the contrary notwithstanding, they are privately enforceable under 42 U.S.C. § 1983. *L.J.* ex rel. *Darr,* 838 F.2d at 123 (1988).

2. Congressional Intent to Foreclose § 1983 Remedy.—In the absence of either a comprehensive remedial scheme for violations of a statute or an explicit, exclusive private cause of action found in the statute itself, Congress cannot be said to have intended to foreclose Section 1983 as a remedial vehicle for statutory violations. *Wright,* 479 U.S. at 423; accord *Wilder,* 110 S. Ct. at 2523-2524. The availability of a state administrative review procedure does not necessarily foreclose a Section 1983 cause of action, *Patsy v. Board of Regents of Florida,* 457 U.S. 496, 516, nor does the ability of the overseeing federal agency to reduce or cut off federal funds for violations of the AAA. *Wilder,* 110 S. Ct. at 2519; *Wright,* 479 U.S. at 424, 428.

The AAA provides that if any state plan fails to abide by the conditions set forth in Section 671(a), the Secretary may reduce or cut off funding. 42 U.S.C. § 671(b). The Act does not provide for private citizen suits directly or the right to judicial review or a comprehensive system of procedures and guarantees. None of the district courts in this Circuit that have considered such suits have found that the limited remedial scheme found in the AAA indicates an intent on behalf of Congress to foreclose Section 1983 as a remedy for violations of the Act. *Norman v. Johnson,* 739 F. Supp. 1182, 1185 (N.D. Ill. 1990) (Hart, J.); *B.H. v. Johnson,* 715 F. Supp. 1387, 1403-1404 (N.D. Ill. 1989) (Grady, C.J.); *Aristotle P. v. Johnson,* 721 F. Supp. 1002, 1011 (N.D. Ill. 1989) (Williams, J.). In light of the limited nature of the review provisions under the Act and the lack of any comprehensive remedial scheme, Congress did not intend to foreclose resort to Section 1983 as a cause of action under the AAA.

B. *Implied Cause of Action Under the Act*

The AAA does not expressly authorize a private right of action enabling those disadvantaged by its violation to enforce its terms. Nevertheless, even if the plaintiffs could not pursue their claims under Section 1983, we conclude that the AAA contains an implied right of private action.

Four factors are to be used in attempting to determine whether Congress intended to make a private remedy available: (1) whether the statute was enacted for the benefit of a special class of which the plaintiff is a member; (2) whether there is any indication of legislative intent to create a private remedy; (3) whether such a remedy is consistent with the underlying purposes of the legislative scheme; and (4) whether a federal remedy is inappropriate because the subject matter involves an area that is primarily of concern to the states. *Cannon v. University of Chicago,* 441 U.S. 677, 717; *Cort v. Ash,* 422 U.S. 66, 78. The Court determined in *Cort* that there was no private right of action for a derivative

suit against corporate directors based upon alleged violation of federal criminal statutes prohibiting certain expenditures of corporate funds on behalf of political candidates largely because the criminal statutes were not enacted for benefit of shareholders. *Cort*, 422 U.S. at 81-82. The majority of the Court in *Cannon* found a private right of action in Title IX of the Education Amendments of 1972 on the basis of all four *Cort* factors in the case of a petitioner who alleged that her applications for admission to medical school were denied because of her sex. The Supreme Court has repeatedly emphasized that the goal is to determine congressional intent, emphasizing the second and third of the four factors. See, *e.g.*, *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16; *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536. Although this inquiry closely resembles the analysis courts use to determine whether a Section 1983 cause of action exists, the burden of demonstrating the existence of each factor lies with the plaintiff asserting the right as opposed to the defendant. *Boatowners*, 716 F.2d at 674; see also *Wilder*, 110 S. Ct. at 2517 n.9; *id.* at 2526 (Rehnquist, C.J., dissenting).

The DCFS again asserts that nothing in the AAA supports the existence of any enforceable rights under the Act. The right asserted by plaintiffs, namely the right to have the DCFS exert "reasonable efforts" to prevent removal of the child from home and "reasonable efforts" to return the child to her home once removed, is unenforceable according to the DCFS for the same reasons that the right is supposedly unenforceable under Section 1983. The district court disagreed with the DCFS and found that such a right exists, citing *Cort v. Ash*, *supra*, *B.H. v. Johnson*, *supra*, and *Wolfe v. New Mexico Dep't of Human Services*, 575 F. Supp. 346, 353 (D.N.M. 1983). In *B.H.*, Chief Judge Grady held that plaintiffs had an enforceable right under Section 1983 to the "case plan" and "case review" requirements found in Section 671(a)(16). Judge Shadur reasoned that to imply an enforceable right under Section 671(a)(16) but not under the subsections re-

lied upon by the plaintiffs here, even though both provisions were contained in the Section outlining required plan features, would be inconsistent since both were conditions for the receipt of federal funds under the Act. *Artist M.*, 726 F. Supp. at 694-695.

The DCFS attempts to distinguish the right enunciated in Section 671(a)(16) from the rights set forth in Sections 671(a)(15) and 671(a)(9) by noting that the Act defines those rights and contains very specific guidelines for implementing the case plan and case review provisions. Yet there is no indication that Congress intended to create a single right to the exclusion of all other alleged rights in an Act; Congress is not required to spell out all rights intended to be created by a federal law merely because it chooses to spell out one. Moreover, the Act's failure to provide a definition of each right is not fatal to plaintiffs' claims. *Wilder*, 110 S. Ct. at 2516, 2525 (failure of Congress to define "reasonable and adequate" did not preclude finding of substantive, enforceable right).

The district court's decisions in this case are not, as the DCFS argues, an invitation for these and future plaintiffs to use the AAA as a tool for federal court interference with all state decisionmaking with respect to its vast child welfare system. As the district court explains in its supplementary findings, under the current system as structured by the DCFS, the assignment of a caseworker is absolutely essential if the DCFS is to make even the first efforts, much less reasonable ones, to maintain the child's family ties, to work towards reunification of the family if appropriate, and to ensure the child's well-being. The district court's injunctive relief does not dictate a method of assigning caseworkers or interfere with the ability of caseworkers to exercise their own professional judgment on the job.[11] The court is not creating

[11] The DCFS argues that in requiring the assignment of a caseworker within three days, the DCFS is deprived of the "flexibility" to make

(footnote continued on next page)

federally enforceable rights to beds, monetary assistance, or housing. The injunction merely fulfills the minimal requirement of the AAA that reasonable efforts are made towards the goals of reducing unnecessary foster care placement and family disruption, and it does so through a method designed to maximize DCFS decisionmaking.

The First Circuit made an analoguous holding in *Lynch v. Dukakis,* 719 F.2d 504, 514 (1983). A class action suit filed on behalf of all children within the jurisdiction of the Massachusetts foster care system alleged in part that the requirements of 42 U.S.C. §§ 671(a)(16), 675(1), 675(5)(B), that the state develop a "case plan" for each child and periodically review the status of the plan could not be met because caseworkers were not promptly assigned to the children in the class. Just as the DCFS argues here that the prompt assignment of caseworkers is not a procedural right guaranteed by the AAA, the defendants in *Lynch* argued that the district court had exceeded its authority by requiring Massachusetts to assign all cases to a caseworker within 24 hours of receipt of a case. *Lynch,* 719 F.2d at 514. The First Circuit quoted with approval the logic of the district court's reasoning: " 'It is evident that when a case is not assigned to a social worker directly responsible for servicing the case, the case planning and periodic review mandated by Title IV-E will not be provided.' " *Id.* It is similarly evident here that when a child is not promptly assigned to a caseworker "reasonable efforts" are not being made, as Congress intended, to "lessen the emphasis on foster care placement and * * * encourage greater efforts to find permanent

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assignments at different rates of speed depending on the gravity of the case or the expertise required (Reply Br. at 23 n.26). The gravamen of the district court's finding, however, is that for each and every member of the class the prompt assignment of a caseworker is a necessary first step toward the "reasonable efforts"required under the AAA. It is difficult to see how this minimal requirement hinders the DCFS in applying greater or lesser degrees of expertise to particular cases at any stage of the process.

homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes."

The Sixth Circuit cited *Lynch* favorably when presented with the suit of a mother seeking, through a Section 1983 action, to enjoin Kentucky social workers from depriving the mother of the "meaningful visitation" purportedly guaranteed by the AAA. *Scrivner v. Andrews,* 816 F.2d 261, 263 (1987). The *Scrivner* court affirmed dismissal of the suit, however, in part on the ground that it could not find such a visitation right in the AAA. Visitation rights are not involved in this case.[12]

Finally, a word is necessary regarding the claim by DCFS that even if other members of the class could maintain an action under the terms of the AAA, children living at home under Juvenile Court orders have no standing to sue. As Judge Shadur explained in analyzing the relevant provisions of the AAA, the language of that statute does not reveal an intention by Congress to limit its terms only to children actually in foster care outside the home, *Artist M.,* 726 F. Supp. at 695, and the DCFS fails to provide a compelling reason to read such a distinction into the statute.

IV. Preliminary Injunction

Plaintiffs' complaint states a cause of action. That requires us to consider the grant of the preliminary injunction. The Court reviews the district court's factual determinations for clear error, Fed. R. Civ. Pro. 52(a), while the legal conclusions are reviewed *de novo. Schwinn Bicycle Co. v. Ross Bicycles, Inc.,* 870 F.2d 1176, 1181 (7th Cir. 1989).

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[12] A panel of the Fifth Circuit has also held that Louisiana officials were not entitled to a qualified immunity defense against a Section 1983 action alleging a series of violations of the AAA that would have amounted to "wholesale neglect" by the officials. *Del A. v. Edwards,* 855 F.2d 1148, 1153-1154 (1988). That decision, however, was vacated for a rehearing en banc, 862 F.2d 1107 (1988), and the appeal was subsequently dismissed without opinion when the plaintiffs voluntarily dismissed their damages claim, 867 F.2d 842 (1989).

The district court correctly evaluated the request for injunctive relief in accordance with *Roland Machinery Co. v. Dresser, Inc.*, 749 F.2d 380 (7th Cir. 1984). After hearing or reviewing extensive testimony, exhibits, and other submissions, the experienced and capable district judge found that plaintiffs introduced ample evidence to support their allegation that they were being deprived of the services to which they were entitled under Section 671(a)(15) as a result of the DCFS practice of not assigning a caseworker to them within a reasonable time period. Judge Shadur further found that the plan being implemented by DCFS to remedy the delay in this assignment still did not assure that caseworkers were assigned, and that without a caseworker many services would be denied members of the class. Accordingly, the court determined that plaintiffs had more than a reasonable likelihood of prevailing on the merits of their claim (App. at 7). A review of the evidentiary transcripts indicates that the district court's finding in this regard is correct. This finding is only reinforced by the further findings issued July 25, 1990, in which the court found that the DCFS has failed to restructure its programs in any effective way in response to its systematic violations of the AAA.

The district court further found that plaintiffs would suffer irreparable harm if the preliminary injunction did not issue. The facts established below indicated that the irreparable harm borne by plaintiffs as a result of the delay in assignment included an increased likelihood that families would be broken up or remain apart, that plaintiffs would be deprived of protective services, and that, in the absence of timely case plans and case reviews, children would be left in "unnecessarily restrictive or dangerous placements, denied * * * essential visits with their parents and place[d] * * * at risk of further injury" (App. at 5). Against these harms the court weighed the harms alleged by the DCFS. Those included adding an extra layer of bureaucracy to the already overburdened agency and diverting resources from other agency

services in order to accommodate an increased number of caseworkers. The balance of harms clearly weighed, in the district court's analysis, in favor of a preliminary injunction.

A review of the findings indicates that the district court's determination that the balance of harms weighs heavily in plaintiffs' favor is not an abuse of discretion, especially in light of this Circuit's rule that monetary loss, here to the DCFS, does not constitute an irreparable injury. *Classic Components Supply, Inc. v. Mitsubishi Electronics America, Inc.*, 841 F.2d 163, 164-165 (7th Cir. 1988).

V. Conclusion

In light of *Wilder v. Virginia Hosp. Ass'n*, 110 S. Ct. 2510, plaintiffs may maintain a cause of action under Section 1983 for alleged deprivations of their federal statutory rights under the AAA. In addition, under *Cort v. Ash*, 422 U.S. 66, plaintiffs may pursue a cause of action against the DCFS directly under the Act. Plaintiffs have established the propriety and justified the scope of the preliminary injunction.

The district court's orders denying the DCFS motion to dismiss and granting plaintiffs' motion for a preliminary injunction pending trial are affirmed. The affirmance includes the April 3, 1990, amendment to the preliminary injunction.[13]

MANION, J., *dissenting.* The Illinois Department of Children and Family Services (the DCFS) may have one of the most difficult assignments in the state. The horror stories recited by the district court produce an almost irresistible desire for judicial intervention. Although the majority presents a compassionate argument supporting such intervention, I must respectfully dissent.

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[13] The Court appreciates the views presented by the *amici* American Civil Liberties Union, *et al.*, and the *amici* Joann Mitchell, *et al.*

Contrary to the court's holding, I believe that the "reasonable efforts" clause of § 671(a)(15) of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 620-628, § 670-679(a) (the "AAA"), is too ambiguous and indefinite to form a basis for a recognizable right and an enforceable obligation under the AAA or § 1983.

The district court and now this court have found that the AAA creates an individually enforceable right to "reasonable efforts" which, at this point, under the injunction invoked by the district court, means that a caseworker must be assigned to each child within three days after that child comes into the custody or under the protection of the DCFS. The majority cites the recent Supreme Court decision of *Wilder v. Virginia Hospital Association*, 110 S.Ct. 2510 (1990), as authority for establishing a child's right to "reasonable efforts" under the AAA. I respectfully disagree. *Wilder's* holding relates to a statutory provision and facts discernably different from that of the present situation. We should instead observe the more applicable legal standards and reasoning of *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), which generally discusses the circumstances in which enforceable rights are derived from a statute's language.

At the outset, I should add that I am not questioning whether an individual child injured by DCFS operations ever has a right of action under § 1983 and the AAA for violations of statutory or constitutional rights. For example, a foster child has a right to sue under § 1983 to enforce his due process right not to be placed with foster parents who the DCFS knows or suspects to be abusive. *K.H. v. Morgan*, 914 F.2d 848 (7th Cir. 1990). The deliberate indifference in the placement of siblings, *Aristotle P. v. Johnson*, 721 F.Supp. 1002 (N.D. Ill. 1989) or the placement of children in homes which detrimentally affect a child's emotional and physical well-being, *B.H. v. Johnson*, 715 F.Supp. 1387 (N.D. Ill. 1989), provide grounds for suit under § 1983 to remedy alleged constitutional violations. But the "reasonable efforts" language in

the AAA which promotes keeping a child in his home or returning him to his home presents no constitutional guarantees, nor does it create any private statutory rights as established by the Supreme Court, see *Pennhurst*, *supra*, and *Wright v. Roanoke Development and Housing Authority*, 479 U.S. 418 (1987). I therefore conclude that the "reasonable efforts" clause of the AAA does not establish any substantive rights enforceable under the AAA itself or through § 1983.

I.

Section 1983 permits individual legal action for violations by State agents of federal "rights, privileges, or immunities." This remedy is not available for simple violations of federal law. *Maine v. Thiboutot*, 448 U.S. 1 (1980). To establish a federal right, a statute must create an obligation binding on the governmental unit. The law must do "more than express a congressional preference for certain kinds of treatment." *Pennhurst*, 451 U.S. at 19. The interest the plaintiff asserts must not be "too vague and amorphous" to be "beyond the competence of the judiciary to enforce." *Wright*, 479 U.S. at 431-32.

The majority concludes *Wilder* supports plaintiff's action under § 1983. In *Wilder* the plaintiff hospital association questioned the "reasonableness" of reimbursement rates established by a state to compensate health-care providers for rendering medical services under the amended Medicaid Act, 42 U.S.C. § 1396. The Court examined a provision of the Medicaid Act (the Boren Amendment) which obligated the states, as a condition for receiving federal financial assistance, to adopt "reasonable and adequate" reimbursement rates for health-care providers rendering services under the Act. The Boren Amendment further stipulated that such "reasonable and adequate" reimbursement rates were to meet the costs of "efficiently and economically operated [medical] facilities." The defendant State resisted the suit claiming that the Boren Amendment did not create rights for health care providers

and that the "reasonable and adequate" standard was vague and thus beyond the competence of the court to interpret.

The Court in *Wilder* permitted the health care providers' suit based largely on its findings that (a) the Boren Amendment imposed a binding obligation on the states participating in the Medicaid program to adopt reasonable and adequate rates for the benefit of health-care providers, and (b) the obligation of the state to adopt rates that are reasonable and adequate was not too vague and amorphous to be judicially enforceable. The Court thus affirmed the principle that a State's denial of its own clearly annunciated obligations provides grounds under § 1983 for action by the intended beneficiaries.

In *Wright v. City of Roanoke Development & Housing Authority, supra*, which the *Wilder* Court explicitly followed, tenants in low-incom housing claimed they were overbilled for utilities in violation of rent ceilings imposed by the Brooke Amendment to the Housing Act of 1937,[1] and its regulations. The Court concluded the statute and regulations did create rights as derived from identifiable obligations of the states which were enforceable under § 1983. The Brooke Amendment limits the amount of rent a public housing tenant can be charged, and regulations adopted pursuant to the statute require inclusion of a "reasonable" allowance for utilities in the rent. 479 U.S. at 430. The Court reasoned that both the statute and the regulations were "mandatory limitation[s] focusing on the individual family and its income." *Id.* at 430. Additionally, the Court rejected the argument that the provision for a "reasonable" utility allotment was too vague to create an enforceable right. Because the regulations set out guidelines for the housing authorities to follow in determining the utility allowance, the right was "sufficiently specific and definite to qualify as [an] enforceable righ[t] under *Pennhurst* and § 1983 [and was] not . . . beyond the competence of the judiciary to enforce." *Id.* at 432.

[1] 42 U.S.C. § 1437a.

In both *Wilder* and *Wright*, the Court gave substance to a statutorily designated standard of "reasonableness" in § 1983 actions. *Wilder* interpreted and enforced "reasonable" rates, *Wright* interpreted and enforced "reasonable" allowances for utility payments. However, the judicial treatment of the "reasonableness" language found in *Wilder* and *Wright* should have no bearing on this case. Under the statutory language in *Wilder*, the court need only recognize the requirement of the states to establish "reasonable and adequate" reimbursement rates. This requires little more than a comparison of the State's established rates for medical services to those customarily charged by health care providers for the same or similar treatment. A federal judge under this statutory scheme can easily discern whether the state's proposed rates were out of line. Likewise, a court has total competence to determine the reasonableness of utility allowances by comparing them to local utility rates.

Both the *Wilder* and *Wright* Courts construed the reasonableness of specific governmental requirements. The disputed "reasonable efforts" clause of the AAA allows no such precision. The "reasonable efforts" clause creates no specific mandate to the DCFS. Therefore there is nothing for the court to determine as being reasonable or unreasonable. Rather than concentrating on the "reasonableness" of a particular governmental activity, § 671(a)(15) relates to the overall reasonableness of every aspect of the foster care program. This significantly distinguishes the present case from *Wilder* and *Wright*. Indeed, it is not at all apparent from reading § 671(a)(15) what precisely are the states' obligations under the AAA, and what enforceable rights have been established for the AAA's beneficiaries. A state's duty to exert "reasonable efforts" in general does not suggest any particular obligation. In contrast, a court can easily determine and enforce a state's obligation to establish "reasonable" reimbursement rates, or provide for "reasonable" utility allowances when setting public housing rents.

Additionally, this court insists that *Wilder* categorically rejects the argument that "reasonable" and "adequate" are vague and unenforceable and concludes the courts are capable of determining whether a state is exerting "reasonable efforts." (*Ante*, pp. 10-12, and 16) What *Wilder* actually says, however, is that a standard like reasonableness is not vague or unenforceable when judged "against an objective benchmark of an 'efficiently and economically operated facility' . . ." 110 S.Ct. at 2523. Similarly in *Wright*, the Court felt competent to enforce the "reasonable" allowance standard only with reference to the objective benchmark of "the individual family and its income." Both "benchmarks" provide a basis for a relatively simple judicial calculation. But in the present case, the AAA provides no such objective benchmark. Rather, the Act gives a general directive that is much too broad to give a federal judge a proper gauge from which to measure reasonable efforts.

In *Pennhurst*, the Court explored the problem of using ambiguous statutory language to establish state obligations and beneficiary rights. The Supreme Court held in *Pennhurst* that § 6010 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000 *et seq.* (the "DDA"), did not create rights enforceable under § 1983 or under the DDA. The plaintiffs in the case, mentally retarded patients at a state hospital, brought suit challenging the conditions of their confinement. Plaintiffs claimed that the treatment they actually received conflicted with provisions conditioning the receipt and availability of federal funds upon state efforts to provide patients with "appropriate treatment" in the least restrictive manner. Since Pennsylvania received money under the DDA, plaintiffs filed suit under § 1983 claiming a violation of their statutory right to "appropriate treatment." The Court found the language "appropriate treatment" and "least restrictive" setting to be "largely indeterminate" and "too thin a reed" to support a creation of rights and obligations on the states. 451 U.S. at 19. "It is difficult to know what is meant

by providing 'appropriate treatment' in the 'least restrictive' setting, and it is unlikely that a State would have accepted federal funds had it known it would be bound to provide such treatment." *Id.* at 24-25.

The Court also specified under what conditions statutory language would create substantive rights and obligations. "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds." *Id.* at 24. The Court analogized: "Legislation enacted pursuant to the spending power," such as the AAA, "is much in the nature of a contract . . . in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract', . . . [t]here can . . . be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* at 17.

The crucial inquiry, therefore, is "not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." *Id.* at 25. The Court found that the statutory language in *Pennhurst* fell well short of providing clear notice to the State that they, by accepting the funds under the Act, would be obligated to provide "adequate treatment" as imagined by the plaintiffs. "[It] strains credulity to argue that participating States should have known of their 'obligations' under" the "adequate treatment" provision. *Id.*

As with the language in *Pennhurst*, the phrase "reasonable efforts" does not communicate or prescribe any specific set of practices which unambiguously notify Illinois of the conditions it must meet in order to receive federal help. "Reasonable efforts"

is an indeterminate statement, to say the least. Rather than being a specific mandate with explicitly detailed directives, § 671 merely encourages the state to set up a plan that outlines the state's proposed method to care for distressed children requiring removal or supervision by the DCFS. Subsection (a)(15) directs the plan to include provisions that "*in each case*, reasonable efforts will be made. . . ." Since every case will be different, "reasonable efforts" cannot be expected to be the same. The vagueness of "reasonable efforts" cannot create binding obligations and rights. Without proper congressional guidance we should refrain from inventing rights which interfere with the foster care system. The successful administration of the system requires substantial expertise and familiarity from its operating personnel and the juvenile courts that oversee each case. It is clear from its plain language that § 671(a)(15) is fashioned to give broad discretion to such child welfare professionals to determine what efforts are reasonable in each situation. Therefore, the courts should not intervene unless the system becomes violative of a child's constitutional rights or rights clearly established by statute.

II.

I conclude where this argument began—with the plaintiffs' complaint that the DCFS does not assign caseworkers quickly enough to meet the standards of the AAA once a child becomes a ward of the juvenile court under the supervision of the DCFS. I agree with this court that the AAA was designed to provide "incentives to encourage a more active and systematic monitoring of children in the foster care system." (*Ante*, p. 7 citing *State of Vermont Dept. of Social & Rehab. Srvs. v. United States Dept. of Health & Human Srvs.*, 798 F.2d 57, 59 (2d Cir. 1986). Incentives in this case do not create rights and binding obligations. A State's failure to perform under a Plan is remedied by Congress' foreclosing federal funding. That may be the only practical alternative under the AAA. Federal courts cannot properly supervise

every aspect of the DCFS operation, something they now may be expected to do given this opinion.

The magnitude of the court's assumed obligation is apparent under the terms of the district court's injunction. The district court enjoined defendant from:

> (a) Failing to assign a caseworker *capable* of providing child welfare services to each of the plaintiffs and their families within three working days of the time that plaintiffs' cases are first heard in juvenile court; and
>
> (b) Failing to assign a caseworker *capable* of delivering child welfare services within three working days of the time that a previously assigned caseworker relinquishes responsibility for any portion of a case.

(Emphasis added.)

The injunction refers to a caseworker "capable" of providing child welfare services. So, in addition to constructing "reasonable efforts" the court must construct the meaning of "capable" under the injunction. The injunction is not clear whether a caseworker "capable" of providing services is one who has the specialized training and ability, or who simply has the time to perform the services. One would hope both, but given the constraints on the system, that may be too much to hope for. The district court has already frowned upon *en masse* assignment of many cases to one caseworker, presumably even if done in three days.[2] The only solution may be very expensive (i.e., hiring and training many more caseworkers).

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[2] In an earlier disposition of this case, when this court entered a partial remand requesting the district court to enter factual findings concerning the current delays in caseworker assignment and reassignment, the district court, after a hearing, submitted a comprehensive set of findings. On the whole, these findings set out a complex set of problems and deficiencies related to the operation of the DCFS. These findings addressed the situation which existed as of March 2, 1990, the time the injunction was issued. The district court's finding 27 notes: "Cases that *were* reassigned during a caseworker's absence were reassigned en

(footnote continued on next page)

The right that we have created in this opinion will allow every child, by his next friend, to challenge the reasonable efforts of the caseworker. If the DCFS, through the recommendation and services of the caseworker, determines that the child should be placed in a foster home, the child's advocate could disagree and challenge the decision in federal court because, in his opinion, the "reasonable efforts" were unreasonable. The same goes for a child who is not put in a foster home, or for the child who is put in a foster home that for some reason (obviously other than his continued exposure to abuse, neglect, or exposure to physical or emotional trauma) is not to his liking.

We are confronted with a tragic class of people—children of alcohol and drug addicts, children victimized by severe domestic violence, children who are abused in unimaginable ways, children who are malnourished, sick and neglected. The district court's order requires that a caseworker be assigned in three days. But if the caseworker, even though assigned, is not meeting someone's definition of reasonable efforts, the district judge will again be petitioned to intervene. With this court's approval of the district court's finding that each of these children have an individual enforceable right to challenge the reasonable efforts of the DCFS, we can anticipate an avalanche of lawsuits seeking to obtain specific social services and mandatory injunctions governing every imaginable detail over the operation of the DCFS. Clearly this is far beyond the intent of Congress.

This opinion moves the court from its proper role as impartial arbiter of cases and controversies under the law to that of a crisis

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masse to a single caseworker, who by the nature and volume of the reassignments was not and could not be expected to provide services." From this it is difficult to see how the injunction is going to assist the overloaded caseworker and his already unmanageable workload. One wonders how the court must consider Finding 27 if a later dispute should emerge on whether such a caseworker is "capable" under the terms of the injunction.

administrator of child welfare. Ironically, this decision, while attempting to advance the well-being of abused children, may instead result in the delay or denial of benefits. Delay and denial will result because standing for injunctive and declaratory relief has now been extended to every plaintiff with a notion of "reasonable efforts" that conflicts with that of the DCFS. The DCFS will most likely experience considerable paralysis because any efforts deemed unreasonable by scrutinizing plaintiffs and courts could cease, resulting in no remedial efforts while litigation continues in situations where something must be done.

Until Congress specifies certain individual rights under the AAA, this court should confine § 1983 actions against the DCFS to alleged constitutional violations such as those in *K.H. v. Morgan*, *supra*, *B.H. v. Johnson*, *supra*, and *Aristotle P. v. Johnson*, *supra*, and otherwise stay out of what is now a reasonably streamlined and publicly accountable chain of command in the distribution of child welfare and assistance benefits. I would reverse the district court.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

December 20, 1990.

ARTIST M., *et al.*,
Plaintiffs-Appellees,

No. 90-1742
90-1764

vs.

JESS McDONALD, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 88 C 10503

Milton I. Shadur, *Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by defendants-appellants on November 13, 1990, and the answer of plaintiffs-appellees, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARTIST M., *et al.*,
Plaintiffs,

v.

GORDON JOHNSON, *et al.*,
Defendants.

No. 88 C 10503

MEMORANDUM OPINION AND ORDER

In December 1988 plaintiffs filed this action as a class action seeking declaratory and injunctive relief pursuant to the Adoption Assistance and Child Welfare Act of 1980 ("AAA"), 42 U.S.C. §§ 620-629, 670-679a—either under 42 U.S.C. § 1983 ("Section 1983") or perhaps via direct action—and under the Due Process Clause. Plaintiffs simultaneously filed a Motion for Preliminary Injunction and a Motion for Class Certification.

Upon presentation of plaintiffs' motions, defendants concurred in the propriety of certifying two classes of plaintiffs:

> Class A: Children who are or will be the subjects of neglect, dependency or abuse petitions filed in the Circuit Court of Cook County, Juvenile Division ("Juvenile Court"), who are or will be in the custody of Department of Children and Family Services ("DCFS") or in a home under DCFS supervision by an order of Juvenile Court and who are now or will be without a DCFS caseworker for a significant period of time.
>
> Class B: Children who are or will be the subjects of neglect, dependency or abuse petitions filed in Juvenile Court who are or will be placed in DCFS' custody and who are or will be without a DCFS caseworker for a significant period of time.

This Court entered a memorandum order certifying both classes, granting plaintiffs' request for expedited discovery and setting

plaintiffs' Motion for Preliminary Injunction for an early evidentiary hearing. After that hearing (the "Hearing") was held, with extensive evidence presented by both sides, the parties presented their post-Hearing submissions.

Defendants in this action are DCFS Director Gordon Johnson ("Johnson") and DCFS Guardianship Administrator Gary Morgan ("Morgan").[1] DCFS is the state agency charged with, among other things, investigating allegations of child abuse and neglect throughout Illinois and caring for children and families who are the victims of child abuse and neglect. This action is concerned solely with cases in the Cook County Region.

Plaintiffs complain that DCFS has a policy and practice of failing promptly to assign a caseworker to court cases following the issuance of a temporary custody or protective (or supervision) order and of failing promptly to reassign court cases when a caseworker goes on leave, is terminated or resigns. Plaintiffs claim that alleged policy and practice violates both AAA and the Due Process Clause.

Post-Hearing Procedures

This Court initially deferred issuance of its post-Hearing finding of fact and conclusions of law pending (2) then-awaited Supreme Court action and (2) DCFS' implementation of a

[1] Morgan testified that although he is named personally by the Juvenile Court as the custodian of children placed in the temporary custody of DCFS, day-to-day decisions regarding those children are made by DCFS personnel who are designated agents of the Guardianship Administrator and who are located in the Area Offices, Division of Child Protection, Interim Service Teams, Emergency Services Center and other units directly responsible for serving children in the care of DCFS. Morgan has no line authority over those persons, nor does he have any responsibility for developing generally any policies with respect to the care of children in DCFS' custody, or specifically with respect to the assignment of caseworkers. Accordingly, although named as a defendant, Morgan does not have any responsibility for the alleged practices and policies challenged in this action.

restructuring plan directly addressing the delays in caseworker assignments.[2] Then just after the end of the Supreme Court's last term this Court issued its July 24, 1989 memorandum opinion and order (the "Opinion," 1989 U.S. Dist. LEXIS 9040 (N.D. Ill.)), requesting supplemental submissions from the parties as to:

> 1. whether *Will v. Michigan Department of State Police,* 109 S.Ct. 2304 (1989) rendered Section 1983 unavailable to plaintiffs;
>
> 2. whether AAA confers on plaintiffs the implied right of action necessary to establish subject matter jurisdiction; and
>
> 3. what standard (intentionally inflicted harm or something less) should be applied to plaintiffs' Due Process Clause claims and whether plaintiffs can meet that standard.

After those supplemental submissions had been tendered, defendants moved under Fed. R. Civ. P. ("Rule") 12(b)(6) for dismissal of the Complaint with prejudice for failure to state a claim. Defendants assert that *no* legal basis exists for any of plaintiffs' claims, pointing to four claimed defects that raise issues substantially similar (if not identical) to those framed in the Opinion:

> 1. Class A plaintiffs lack standing to sue under AAA because they are not in foster care.
>
> 2. AAA neither authorizes a private right of action nor gives rise to enforceable rights under Section 1983 to secure continuous caseworker assignments.
>
> 3. Plaintiffs' Due Process Clause claim is flawed because the Fourteenth Amendment does not mandate immediate, continuous caseworker assignment and because plaintiffs do not contend defendants acted intentionally.
>
> 4. *Will* bars plaintiffs' claim for sweeping injunctive relief.

This opinion addresses each of those contentions, though not in the same order.

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[2] During the Hearing DCFS representatives had testified as to its adoption and ongoing implementation of that plan.

Implied Statutory Rights of Action and Section 1983 Rights of Action

Despite defendants' confluence of analysis as to the existence vel non of implied rights of action under AAA and enforceable rights under Section 1983, those are really two distinct inquiries. *Samuels v. District of Columbia*, 770 F.2d 184, 194 (D.C. Cir. 1985) confirms that "statutory Section 1983 claims differ significantly from implied private rights of action." *Boatowners and Tenants Association, Inc. v. Port of Seattle*, 716 F.2d 669, 674 (9th Cir. 1983) underscored that difference:

> There are both substantive and evidentiary distinctions between the two causes of action.

Because of those distinctions and in the interest of clarity, this opinion will examine each type of claim individually.

1. *Implied Rights Under AAA*

About the only legal proposition the parties here agree upon is that *Cort v. Ash*, 422 U.S. 66, 78 (1975) establishes the framework for determining whether a statute contemplates an implied right of action for a given individual or class. To that end *Cort*, *id.* (citations omitted, emphasis in original) calls for this inquiry:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted" . . .—that is, does the statute create a federal right in favor of the plaintiff? . . . Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Later refinements of the *Cort* analysis have brought matters to the situation well summarized in *King v. Gibbs*, 876 F.2d 1275, 1280-81 (7th Cir. 1989):

> In its recent pronouncements, the Court has reaffirmed the use of the *Cort* test but has also made it clear that the principal focus is on the second of the *Cort* factors—whether the legislature intended to create a private cause of action. *See Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Touche Ross & Co. v. Redington*, 422 U.S. 560, 568 (1979). The first and third of the *Cort* factors are aids in determining that intent, *Touche Ross*, 422 U.S. at 575-76; *see also* P. Bator, D. Meltzer, P. Mishkin, D. Shapiro, *The Federal Courts and the Federal System* 946 (1988), and, by negative implication, it is unclear whether the fourth *Cort* factor—whether the cause of action is generally thought of as a matter of state concern—has any continuing significance. *But see Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 465 U.S. 353, 393 (1982) (Court noted that fourth *Cort* factor favored implying private right of action under a provision of the Commodities Exchange Act.). In sum, unless a congressional intent to create the right of action "can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 94 (1981).

It was against that backdrop that Opinion at 8 stated:

> At least until otherwise demonstrated, then, it must be considered that AAA provides plaintiffs no direct ticket of entry to this federal court.

That was not of course a prejudgment of the issue—it rather confirmed that the burden rested on plaintiffs to make an affirmative showing of congressional intent to create a private right of action (*Boatowners*, 716 F.2d at 674). Now they have sought to do just that.[3]

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[3] Until plaintiffs were called upon to respond to the Opinion, they had dealt only with issues bearing on the viability of a Section 1983 action. This is the first opportunity this Court has had to evaluate plaintiffs' arguments bearing on the implication of a private right of action under AAA.

AAA's enactment antedated the Supreme Court's toughening stance on the implication of private causes of action for statutory violations. It is hardly surprising, then, that AAA's provisions neither expressly create nor expressly deny a private right of action, and its legislative history is equally silent in that respect. Consequently the search has to shift to the general language and structure of the statute and to the circumstances of its enactment (see *Thompson v. Thompson*, 108 S.Ct. 513, 516 (1988)).

Initially plaintiffs urge that the circumstances surrounding AAA's enactment support implication of a private right of action. AAA was adopted as an amendment to the Social Security Act, a statute as to which the Supreme Court has allowed private enforcement (e.g., *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980); *Miller v. Youakim*, 440 U.S. 125 (1979)). But that fact does not support the parallel inference plaintiffs seek to draw, for the cases to which they point were brought under Section 1983 and *not* directly under the substantive statute (the Social Security Act). Thus the amendatory character of AAA and the enforcement history of the underlying Social Security Act cannot alone carry the weight plaintiffs attempt to rest on their shoulders.

Nonetheless other courts have found support in AAA's language and internal structure for the implication of some rights of action. Such cases as *B.H. v. Johnson*, 715 F.Supp. 1387, 1402 (N.D. Ill. 1989) and *Joseph A. by Wolfe v. New Mexico Department of Human Services*, 575 F.Supp. 346, 353 (D. N.M. 1983) have allowed private plaintiffs to enforce the statute's procedural requirements of case plans and case reviews—a development conceded by defendants (Mem. 12).[4] Such private rights of enforcement are inferred from two parallel provisions of AAA:[5]

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[4] Although they make that concession, defendants contend that the Complaint here fails to allege a violation of those rights. That contention is fully addressed below.

[5] Because AAA (like Section 1983) is found in Title 42, its provisions will also be cited simply "Section—."

> 1. Section 627(a)(2)(B) says the eligibility of a state to receive an appropriation under AAA is predicated upon its implementation and operation of "a case review system . . . for each child receiving foster care under the supervision of the state."
>
> 2. Section 671(a)(16) reiterates that requirement by listing as a "requisite" feature of each State plan that it "provide [ ] for the development of a case plan . . . for each child receiving foster care maintenance payments . . . and . . . for a case review system . . . with respect to each such child."

If those provisions suffice to grant private enforcement rights to the children for whom such case plan and case reviews are required, it seems only logical to draw parallel inferences from other requirements enumerated in the selfsame sections. Section 627(a)(2)(C) conditions a State's eligibility for AAA appropriations on its implementation and satisfactory operation of "a service program designed to help children, where appropriate, return to families from which they have been removed or be placed for adoption or legal guardianship." Similarly Section 671(a) imposes not only the already-quoted case plan and review requirements but also mandates that every State plan must:

> (9) provide [ ] that where any agency of the State has reason to believe that the home or institution in which a child resides whose care is being paid for in whole or in part with funds provided under this part or part B of this subchapter is unsuitable for the child because of the neglect, abuse, or exploitation of such child, it shall bring such condition to the attention of the appropriate court or law enforcement agency;
>
> * * *
>
> (15) . . . provide [ ] that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home. . . .

Certainly there is nothing to distinguish among the several statutory requirements—to suggest that one is less mandatory than the others. And that equal emphasis is confirmed by AAA's legislative history. In the Joint Explanatory Statement of the Committee of Conference, H. Conf. Rep. No. 96-600, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 1566-67, both "#6. Case Plan & Case Review System" and "#7. Preventive and Reunification Services" were given parallel billing among the subheadings listed under the heading "New Foster Care (and Adoption Assistance) State Plan Requirements."

In sum, if private plaintiffs have the right (as defendants in fact acknowledge they do) to enforce their statutory entitlements to case plans and case reviews, the rights of the plaintiff class here to obtain preventive and reunification services must enjoy the same standing.[6] Hence the predominant *Cort* factor—that of inferred legislative intent—is satisfied. And as the ensuing discussion reflects, the consideration of other *Cort* factors leads to the same conclusion.

For one thing, Congress certainly enacted AAA for the "especial benefit" of children coming within both Class A and Class B here—that is, both children in DCFS custody *and* children who are the subject of petitions filed in Juvenile Court but who remain at home under DCFS supervision by order of that court. Defendants give a distorted picture of AAA, arguing that States are

[6] To the extent *B.H.*, 715 F.Supp. at 1401 reaches a different conclusion, this Court must disagree. *B.H., id.* coupled the "least restrictive setting" provision for individual placements with the statutory mandate of "reasonable efforts," finding each insufficient to create enforceable affirmative obligations on the states. Whatever the infirmities of the first of those criteria may be in that respect, they do not infect the "reasonable efforts" mandate. Courts have long proved themselves adequate to the task of enforcing contractual "best efforts" obligations, and they equally regularly enforce commitments of parties to conduct themselves "reasonably." No reason appears to treat AAA's statutorily-created contract any differently.

given funds to provide services only to children *in* foster care. That reading glosses over (or misses entirely) the provisions strewn throughout AAA that require (not just encourage) States to provide services to children and families *in their homes* in an effort to reduce the numbers of children needing foster home placement:

> 1. Section 670 states "there are authorized to be appropriated for each fiscal year . . . such sums as may be necessary to carry out the provisions of this part."
>
> 2. As already stated, Section 671(a)(15)(A) (emphasis added) requires that the State make reasonable efforts "*prior to* the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home. . . ."
>
> 3. It is also worth noting that Section 627(b)(3) (emphasis added) requires a reduction in Title IV-B funds "unless such State . . . has implemented a preplacement preventive service program designed to help children *remain* with their families."[7]
>
> 4. Section 672(a)(1) includes among the children qualifying for foster care maintenance payments program those whose "removal from the home occurred [as] the result of a judicial determination to the effect that . . . reasonable efforts of the type described in section 671(a)(15) of this title have been made."

In light of these extensive statutory references to preplacement services, defendants' assertion that AAA applies only to children

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[7] While Class A plaintiffs make no claims under that section, its very existence evidences Congress' intent to benefit not only children in foster care but also those children who, by virtue of being before the Juvenile Court, face the prospect of being taken into foster care. Defendants claim that reading AAA to apply to those children will in turn given rights of action to *all* children in the State—but that totally ignores the point that DCFS has filed a petition for adjudication of wardship in the Juvenile Court for every member of Class A, a fact that obviously sets those children apart from all others living at home inside the State.

in foster care must be perceived as untenable (if not indeed disingenuous).

Finally, implying a private right of action is fully consistent with the underlying purposes of the legislative scheme—the third *Cort* factor. As the above analysis reflects, that scheme must be understood as having two related parts:

> 1. providing adequate services to children in foster care through a case plan and case review system; and
>
> 2. keeping as many children as possible out of the foster care system by providing preplacement preventive services and family reunification services.

To imply a private right of action to enforce the former, while denying such a right as to the latter, defies common sense. *Both* classes of plaintiffs have implied causes of action to enforce their rights as established under AAA.

2. *Section 1983 Enforceable Rights*

In contrast to the just-completed discussion, a plaintiff who invokes Section 1983 to complain of a federal statutory violation need not show congressional intent to provide access to that remedy (*Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 20 n.31 (1980)). Instead, as *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 425 (1986) articulates, Section 1983 is presumed to be available for such redress except where Congress has foreclosed such enforcement in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of Section 1983. Defendants claim both those exceptions apply here, but again they fail to persuade.

First defendants maintain that AAA does not create an enforceable right to prompt and continuous assignment of caseworkers. But whatever the validity of that proposition may be (a

question that need not be resolved in this opinion), it is simply a straw man here: It misstates, rather than addressing head on, the claims advanced by the plaintiff classes.[8] And as for the rights plaintiffs *do* advance, the just-completed analysis has confirmed the existence of directly enforceable statutory rights under AAA. To reject such enforceability via Section 1983 would be anomalous indeed in light of the uniform authority exemplified by *Wright.*

Courts have consistently confirmed Section-1983-enforceable rights to case plans and case review systems (*L.J. by and through Darr v. Massinga*, 838 F.2d 118, 123 (4th Cir. 1988); *Lynch v. Dukasis*, 719 F.2d 504, 510-12 (1st Cir. 1983); *B.H.*, 715 F.Supp. at 1402). This Court has already found those statutory commands equivalent to those called upon by plaintiffs here. And to the extent that *B.H., id.* at 1401 concluded that AAA's "reasonable efforts" provisions failed to meet the "clear" and "unambiguous" standard expressed in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (19[illegible]), as necessary to create a "contract" between the State and the federal government, this Court must again disagree.[9] Any State that read (or for that matter neglected to read) AAA and accepted federal funds under it had to know it was obliged both to provide case plan and case review services *and* to provide services aimed at preventing removal and facilitating reunification.

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[8] In part echoing AAA's statutory language, plaintiffs rather assert rights to (1) "reasonable efforts" to prevent removal of children from their homes, (2) "reasonable efforts" to facilitate reunification of families when removal has occurred, (3) notification of Juvenile Court or appropriate law enforcement agencies when a child is neglected, abused or exploited in placement and (4) development of case plans and a case review system to ensure that each child in placement is provided appropriate services. While the Complaint cites DCFS' failure promptly and continuously to assign caseworkers, it does so only in an attempt to illustrate the DCFS policies and practices that give rise to violations of the claimed rights.

[9] See n.6.

Nor does the holding in *Scrivner v. Andrews*, 816 F.2d 261, 263-64 (6th Cir. 1987) that AAA did not create enforceable rights to "meaningful visitation" change the conclusions here. No provision of AAA mandates "meaningful visitation" in terms—or even implicitly.[10] And while *Scrivner, id.* at 263 correctly noted that AAA affords the State "considerable flexibility in unilaterally developing administrative procedures" to implement its foster care program, that cannot render the State free to ignore other obligations expressly imposed by AAA's language. In that respect *Wright*, 479 U.S. at 431-32 made it plain that the use of the word "reasonable" in a statutory provision does not render the requirement too vague or ambiguous to be enforced.

Defendants also fail to demonstrate that Congress intended to foreclose the use of Section 1983 to enforce the rights secured under AAA. Although AAA does establish some enforcement mechanisms, they are not "sufficiently comprehensive and effective to raise a clear inference that Congress intended to foreclose a § 1983 cause of action . . ." (*Wright*, 479 U.S. at 425). To that end defendants point to three AAA provisions as the assertedly comprehensive remedial scheme:

> 1. the ability of the Secretary of the Department of Health and Human Services to withhold funds (Section 671(b));
>
> 2. the state plan providing for a post-deprivation hearing (Section 671(a)(12)); and
>
> 3. the dispositional hearing (Section 675(5)(c)).

Rosado v. Wyman, 397 U.S. 397, 420 (1969) rejected just such an argument based on a power wholly parallel to the first of those,[11] stating the Court was "most reluctant to assume Con-

[10] That absence of a specific obligation of the nature sought to be enforced in *Scrivner* contrasts sharply with the statutory duty to make specifically-defined "reasonable efforts," on which plaintiffs rely here.

[11] In *Rosado* the State defendant relied on HEW's power to cut off federal funds. It should also be emphasized that *Rosado* remains good law today (always a source of concern in citing Supreme Court decisions of a legal generation ago). It was cited as authority on precisely this point in *Wright*, 479 U.S. at 428.

gress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." And certainly the statute's limited administrative remedies (the second and third cited factors) do not constitute a comprehensive remedial scheme precluding Section 1983 relief (*Wright*, 479 U.S. at 424)—as *Lynch*, 719 F.2d at 512 recognized, they are utterly unresponsive to cases like the one at bar "where a class alleges systemic malfeasance."

It is clear, then, that AAA does create enforceable rights and that Congress has not precluded their enforcement with a comprehensive remedial scheme. Hence plaintiffs have a cause of action under Section 1983 as well as directly under AAA.

Will and the Eleventh Amendment[12]

This is undeniably an official-capacity lawsuit against Johnson. It therefore becomes necessary to examine *Will*'s restrictive definition of the "persons" entitled to invoke Section 1983.

Will, 109 S.Ct. at 2312 says flatly:

> Neither a State nor its officials acting in their official capacities are "persons" under § 1983.

Without more, that unqualified assertion would render Johnson —wearing his official-capacity hat—immune to plaintiffs' present action. But *Will*, *id.* at 2311 n.10 restores what the quoted sentence seems to take away: It imports familiar principles of Eleventh Amendment jurisprudence to provide an exception to the apparently rigid and restrictive definition of "persons." Calling on the fiction (originally expounded in *Ex parte Young*, 209 U.S. 123 (1908)) that any state official who violates constitutional rights is perforce stripped of his or her official character and is thus no longer protected by the sovereign's immunity, *Will*'s n.10 (citations omitted) says:

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[12] Since issuing the Opinion this Court has had occasion to address the issues treated in this section in *Illinois Health Care Ass'n v.*

(footnote continued on next page)

> Of course a State official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because "official capacity actions for prospective relief are not treated as actions against the State." . . . This distinction is "commonplace in sovereign immunity doctrine," . . . and would not have been foreign to the 19th-century Congress that enacted § 1983. . . .

Thus the operative question becomes whether plaintiffs' prayer for declaratory and injunctive relief falls into the category of actions seeking prospective relief, allowable under Section 1983 by *Will*'s n.10 and under the Eleventh Amendment by *Ex parte Young*, or into the disallowed category of actions seeking to tap the State treasury. By now it is familiar doctrine that the line between such allowed and disallowed actions is not one between night and day—for the simple fact that the sought-after relief will have adverse fiscal consequences for the sovereign will not automatically bar the claim (*Edelman v. Jordan*, 415 U.S. 651, 667-68 (1973)). Instead a court must look beneath the surface of plaintiffs' claims to determine their true objectives in the terms made dispositive by *Ex parte Young* and its progeny.

Edelman, *id.* at 668 has made it plain that no matter how it is labeled, any relief that amounts to a damage award will be barred by the Eleventh Amendment. Had plaintiffs here sought compensation for the claimed past harm stemming from Johnson's allegedly illegal foster care scheme, this Court would have had to dismiss their claim. But plaintiffs have made it equally clear that such is *not* their intention, nor would such reimbursement automatically flow from their success on the merits. As plaintiffs would have it, a declaration by this Court to the effect that Johnson is violating the specified provisions of AAA, coupled with an injunction compelling future compliance,

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Suter, 1989 U.S. Dist. LEXIS 12729 (N.D. Ill.). Instead of reinventing the wheel, this opinion borrows both freely and unabashedly from that prior effort.

would provide the necessary impetus (1) to force DCFS to live up to its obligations under AAA or (2) if it is unwilling to comply, to force it to bail out of the cooperative state-federal plan and go it alone in the area of foster care, free from the federal requirements.[13]

Obviously the latter option would involve no necessary drain on the sovereign's fisc. And although the alternative of compliance with AAA (which may be assumed to represent plaintiffs' preferred outcome) *would* impact state finances, the existence of such financial impact is not itself dispositive. As *Papasan v. Allain*, 478 U.S. 265, 278-79 (1985) teaches:

> [R]elief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury.

By contrast, *Edelman*, 415 U.S. at 668 held the underlying claim in that case was retrospective and violative of the Eleventh Amendment because the amount of fiscal burden placed on the State would be measured in terms of a monetary loss resulting directly from a *past* breach of a legal duty on the part of the defendant State officials.

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[13] Plaintiffs' prayer for relief seeks entry of a specific order requiring DCFS to adopt a plan with certain substantive elements. As long as such a plan was only forward-looking, it would not run afoul of the principles discussed in this section. It would, however, present another problem. While this Court must enforce the mandatory requirements of federal law, it should not become involved in micromanagement of the State child care system. Rather as *Lynch*, 719 F.2d at 513 (summarizing *Rosado*) noted:

> [I]n such cases the district court should announce what is necessary to comply with the federal program and then allow an appropriate period of time for the state to decide whether it preferred to forego [sic] federal funds. If the state decides to retain funding it must propose a plan for achieving compliance which would then be subject to court approval.

It seems the line between an "ancillary" economic effect (permitted by the Eleventh Amendment) and a "direct" effect (barred by that Amendment) depends on whether the finding of State violations of federal law will be accompanied by an order to make whole the individuals who were injured by those past violations. If the federal court simply orders a State to conform its future conduct to the requirements of federal law, even though that will cost money (even a good deal of it) the future impact on the State treasury is normally perceived as "ancillary" (*Quern v. Jordan*, 440 U.S. 332, 337 (1979)).

Here plaintiffs make no plea for reparations of the harm caused by Johnson's alleged past violations of the Act, asking instead only for a declaration as to whether Johnson's admitted conduct amounts to a continuing violation of the Act and, if that is so, for a preliminary injunction. Neither *Will* nor the Eleventh Amendment bars this action in Section 1983 terms.

Due Process Clause

DeShaney v. Winnebago County Department of Social Services, 109 S.Ct. 998, 1004-07 (1989) teaches that the Due Process Clause imposes no affirmative obligations on the State to provide services to the general public—instead, such duties attach only "in certain limited circumstances [where] the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals" (*id.* at 1004-05). For that reason Opinion at 11-13 directed the parties to address the inquiry as to whether Class B plaintiffs—those in DCFS' custody[14]—meet that test. That inquiry now gets an affirmative answer.

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[14] Only Class B plaintiffs assert violations of their rights to due process. Had Class A plaintiffs sought to do the same, that claim would have been blocked by *DeShaney*.

DeShaney, 109 S.Ct. at 1006 n.9 specifically left open the question as to whether children whom the State removes from their homes and places in foster homes enter into a special relationship with the State giving rise to an affirmative right to protection. Despite that properly cautious reservation of an issue not directly before the Supreme Court, this Court finds strong signals in *DeShaney*'s characterization of the treatment of involuntarily committed mental patients in *Youngberg v. Romeo*, 457 U.S. 307, 315-17 (1972). *DeShaney*, 109 S.Ct. at 1005-06 (citations omitted) explained *Youngberg* this way:

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

To counter the parallel thrust of *Youngberg* (and its reconfirmation in *DeShaney*), defendants adduce *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 510-11 (1981) for the proposition that children in foster care are not under the direct physical control of the State and are no more restrained than children living with their own parents. *Lehman* cannot rule the day. It was a habeas case that addressed a set of concerns (whether the children were in "custody" in traditional habeas terms) very different from those relevant here. But when DCFS obtains an order to remove a child from his or her home and takes that child into protective custody, it is surely exercising affirmative State power over that child to the extent that it must assume responsibility to provide for the child's basic needs. To hold otherwise would be to turn a blind eye on the realities facing a child who has been removed from home. Many courts (see, e.g., this Court's opinion in *Rubacha by Rubacha v. Coler*, 607 F.Supp. 477, 479 (N.D. Ill. 1985), and see cases collected in *DeShaney*, 109 S.Ct. at 1006 n.9) have reached precisely that conclusion.

Establishment of the required "special relationship" between the State and the Class B plaintiffs does not end the inquiry. It remains to consider by what standard the State's conduct must be measured under the "special relationship" doctrine. In that respect *Archie v. City of Racine*, 847 F.2d 1211, 1218-20 (7th Cir. 1988) provides the necessary guidance.

Archie began with the basic rule of *Daniels v. Williams*, 474 U.S. 327, 331-36 (1986) and *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986) that merely negligent State conduct does *not* constitute a deprivation under the Due Process Clause. *Archie* went on to the question left open by *Daniels*, *id.* at 334 n.3:

> Whether something less than intentional conduct, such as recklessness or "gross negligence," is enough to trigger the protections of the Due Process Clause.

Because " '[r]ecklessness' is a proxy for intent [and] 'gross negligence' is not," *Archie*, 847 F.2d at 1220 reasoned that only recklessness or something greater can give rise to a due process violation. And because use of the tort law definition of recklessness would not adequately distinguish between constitutional and common law obligations, *Archie*, *id.* at 1219 explained further:

> An act is reckless in the pertinent sense when it reflects complete indifference to risk—when the actor does not care whether the other person lives or dies, despite knowing that there is a significant risk of death.

Here Class B plaintiffs allege violations of their "constitutionally protected interests in conditions of reasonable care and safety" (*Youngberg*, 457 U.S. at 324), including both physical safety (*Rubacha*, 607 F.Supp. at 479) and emotional well being (*B.H.*, 715 F.Supp. at 1394). Thus the proper inquiry is whether defendants' conduct reflects complete indifference to a known significant risk to such physical and emotional safety. Even with the required reasonable inferences in Class B plaintiffs' favor, nothing alleged in the Complaint here suggests such total indifference on

defendants' part. Class B plaintiffs cannot properly maintain a cause of action under the Due Process Clause.

Conclusion

Defendants' motion to dismiss is granted only as to plaintiffs' due process claim. It is denied in all other respects. That leaves open the substantive issues posed by plaintiffs' Motion for Preliminary Injunction and the extended Hearing. Because those issues may be impacted importantly by the current status of DCFS' restructuring plan described during the Hearing:

1. On or before November 30, 1989, defendants are ordered to file and to serve on plaintiffs' counsel a written report on that current status.

2. This case is set for a status hearing at 9 a.m. December 7, 1989 to treat with any questions that report may have left unanswered.

Milton I. Shadur
United States District Judge

Date: November 21, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARTIST M., *et al.*,
Plaintiffs,
v.
GORDON JOHNSON, *et al.*,
Defendants.

No. 88 C 10503

PRELIMINARY INJUNCTION

On December 14, 1988 Artist M., Sarah B., Claude F., Algienan G., Myron C., Willie M., Brandon W. and Amber B. filed a Complaint on behalf of themselves and the class of all children (collectively the "plaintiffs") who are or will be placed in the custody or under the supervision of the Illinois Department of Children and Family Services ("DCFS") in the course of an abuse, neglect or dependency proceeding in the Juvenile Division of the Circuit Court of Cook County, Illinois ("Juvenile Court"). Plaintiffs challenge defendants' policy and practice of failing to assign caseworkers to them in a timely manner. Plaintiffs assert that these policies and practices violate their rights under the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. ¶¶ 620-629, 670-679a ("AAA").[1] More specifically, plaintiffs assert that because of DCFS' caseworker assignment system, defendants fail to make reasonable efforts to preserve families when children are at risk of removal; to make reasonable efforts to facilitate reunification of families whose children have been removed; to develop case plans and a case review system for each child in foster care; and to monitor plaintiffs' foster homes so as to learn

[1] Originally plaintiffs also alleged that defendants' policies and practices violate the Due Process Clause of the Fourteenth Amendment. However, that count was dismissed by this Court on November 21, 1989. Plaintiffs' AAA claims remain intact.

of any additional abuse or neglect. In plaintiffs' view, defendants' caseworker assignment system violates each of these requirements.

At the time of filing their Complaint, plaintiffs also filed motions for a preliminary injunction and for class certification, each supported by a memorandum of law. Defendants responded by filing a memorandum in opposition to plaintiffs' motion for preliminary injunction on January 13, 1989.[2] On January 17, 18 and 19 this Court held an evidentiary hearing (the "Hearing"), admitting into evidence testimony and exhibits regarding defendants' caseworker assignment system and its application to the cases of specific plaintiffs. Following the submission by the parties of their proposed findings of fact and conclusions of law, this Court held in abeyance its decision on plaintiffs' motion for preliminary injunction until after consideration of the Supreme Court's decision in *Will v. Michigan Dept. of State Police,* 109 S. Ct. 2304 (1989), defendants' motion to dismiss, and defendants' attempts to restructure their caseworker assignment system.

At present, plaintiffs seek to enjoin, during the pendency of this action, defendants' policy and practice of failing to provide a caseworker to each of the plaintiffs and their families within 24 hours after the Juvenile Court places them in DCFS' temporary custody or returns them home under DCFS' supervision. Plaintiffs also seek to enjoin defendants' policy and practice of failing to provide a caseworker to them at all subsequent times while their cases are pending in Juvenile Court. This Court has given full consideration to the evidence submitted at the Hearing, reports tendered to it regarding the current status of defendants' caseworker assignment system, the arguments of counsel and the

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[2] With the agreement of defendants' counsel, on December 16, 1988 this Court granted plaintiffs' motion for class certification pursuant to Fed. R. Civ. P. ("Rule") 23(c)(1), both as to Class A (all plaintiffs) and as to Class B (the subclass of children who are or will be placed in DCFS' custody).

relevant authorities. In accordance with Rules 52(a) and 65(d) it is hereby ordered, adjudged, and decreed:

1. This Court has subject matter jurisdiction of this action under 28 U.S.C. §§ 1331 and 1343.

2. This Court's exercise of its discretion in reviewing the request for preliminary relief is guided by the five factors identified in *Roland Machinery Corp. v. Dresser Industries, Inc.*, 749 F.2d 380 (7th Cir. 1984). This Court finds that current issuance of a preliminary injunction is necessary and appropriate because;

a. *Plaintiffs have no adequate remedy at law. Roland Machinery, id.* at 386 establishes that plaintiffs have no adequate remedy at law if damages will be seriously deficient as a remedy for the harms suffered. Here plaintiffs ultimately seek declaratory and injunctive relief rather than damages. This Court holds that damages would not provide an adequate remedy for the violation of plaintiffs' rights under AAA in this case.

b. *Plaintiffs will suffer irreparable harm if a preliminary injunction is not issued.* This Court finds that the deprivation of plaintiffs' rights under AAA to reasonable efforts, case plans, case reviews and monitoring of their foster placements constitutes irreparable harm. By failing to assign and replace caseworkers promptly, DCFS increases the likelihood that families will be broken up or remain apart. Unnecessary loss of a familial relationship is an injury that cannot be repaired or made whole. In addition, defendants' failure to assign and replace caseworkers in a timely fashion deprives plaintiffs of services that appropriate case plans and case reviews would provide, leaves them in unnecessarily restrictive or dangerous placements, denies them essential visits with their parents and places them at risk of further injury. These, too, are irreparable harms.

c. *Plaintiffs have demonstrated a reasonable likelihood of success on the merits.* Plaintiffs have exceeded the threshold established in *Roland Machinery, id.* at 387 regarding the likelihood of their success on the merits

of their Complaint. As this Court stated in its November 21, 1989 memorandum opinion and order (the "Opinion"), plaintiffs may enforce their rights under AAA either through an implied cause of action or through 42 U.S.C. § 1983 (Opinion at 4-16). These enforcement mechanisms are available both to plaintiffs in DCFS' custody and to plaintiffs residing with their parent(s) or guardian under DCFS' supervision (Opinion at 8-12). Upon review of the evidence presented at the Hearing and the submissions of the parties regarding DCFS' restructuring of their caseworker assignment system, this Court finds that plaintiffs have clearly established more than a reasonable likelihood of success on the merits of their claims under AAA. Plaintiffs have demonstrated that the deficiencies in defendants' caseworker assignment system regularly cause children in their care and under their supervision to be deprived of the services of caseworkers for significant periods of time. Without a caseworker, defendants cannot put into place the services and protections to which plaintiffs are entitled under AAA. Defendants' efforts to restructure their caseworker assignment system during more than a year since the Hearing have failed to eliminate those systemic deficiencies from their system, or even to minimize the effects of those systemic deficiencies. In terms of 42 U.S.C. § 671(a)(15), plaintiffs have demonstrated more than a reasonable likelihood of success on the merits of their claim that defendants' failures during the period since the Hearing show they have not exercised the "reasonable efforts" called for by that statute.

d. *Balancing of harms favors the plaintiffs.* While plaintiffs will suffer immediate and irreparable harm this Court does not issue a preliminary injunction, defendants have not asserted any interest that is sufficiently compelling to require that their current caseworker assignment system remain intact. Defendants themselves have suggested that assigning caseworkers within three days of the time that a temporary custody case is first heard in Juvenile Court would not be overly burdensome (Defendants' August 4, 1989 Supplemental

Submission at 29). Additionally, defendants have indicated to this Court that they are capable of assigning a caseworker before the case is first heard in Juvenile Court when children are to be returned home under court supervision (Defendants' November 30, 1989 Supplemental Report at 2). Finally, defendants have offered no justification—compelling or otherwise—for failing to assign a caseworker promptly after the previously assigned caseworker relinquishes responsibility for a case. Consequently, this Court finds that the potential harm to plaintiffs if a preliminary injunction is denied by far outweighs any potential harm that defendants may suffer by the grant of a preliminary injunction.

e. *Issuance of a preliminary injunction will not disserve the public interest.* When emergency relief will cause defendants to follow congressional mandates, the public interest is always served (*Children's Memorial Hospital v. Illinois Department of Public Aid*, 562 F. Supp. 165, 174 (N.D. Ill. 1983)). Any court order that requires defendants to ensure that a caseworker is capable of delivering appropriate child welfare services to the plaintiffs and their families, in compliance with AAA, clearly serves the public interest.

3. Plaintiffs' motion for a preliminary injunction is therefore granted. Based on the evidence and reports presented to it, however, this Court will modify the relief requested by plaintiffs. This Court finds that an injunction requiring defendants to assign a caseworker within three working days realistically reflects the institutional capabilities of DCFS. This Court will similarly require that defendants assign a caseworker within three days of the time that a previously assigned caseworker relinquishes responsibility for a case. Finally, to ensure that defendants fully comply with AAA, this Court will also prohibit them from assigning or transferring any case to any caseworker who, because of an excessive caseload, is incapable of delivering the services to which plaintiffs are entitled under AAA.[3]

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[3] In that respect, plaintiffs have proposed a 40-family caseload limit on caseworkers. Defendants point out accurately that the Hearing did not

(Footnote continued on following page)

4. Accordingly, Gordon Johnson, Gary T. Morgan and their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with any of the foregoing who receive actual notice of this order by personal service or otherwise, are hereby enjoined from:

(a) failing to assign a caseworker capable of providing child welfare services to each of the plaintiffs and their families within three working days of the time that plaintiffs cases are first heard in Juvenile Court; and

(b) failing to assign a caseworker capable of delivering child welfare services within three working days of the time that a previously assigned caseworker relinquishes responsibility for any portion of a case. These provisions shall take effect May 31, 1990.

Milton I. Shadur
United States District Court Judge

DATED: March 2, 1990

(Footnote continued from previous page)
deal with that subject in evidentiary terms. Accordingly, this order speaks in terms of "a caseworker capable of providing child welfare services" without imposing a specific ceiling. But defendants are duty-bound to comply with that requirement, not to make assignments on paper that are not effective in practice.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARTIST M., *et al.*,
Plaintiffs,

v.

GORDON JOHNSON, *et al.*,
Defendants.

No. 88 C 10503

ORDER

On March 2, 1990 this Court entered a preliminary injunction ("Preliminary Injunction") enjoining defendants from (*id.* at 8-9):

> (a) failing to assign a caseworker capable of providing child welfare services to each of the plaintiffs and their families within three working days of the time plaintiffs' cases are first heard in Juvenile Court; and
>
> (b) failing to assign a caseworker capable of delivering child welfare services within three working days of the time that a previously assigned caseworker relinquishes responsibility for any portion of a case.

Those provisions are to take effect May 31, 1990 (*id.* at 9). Plaintiffs have requested that this Court order defendants to provide a mechanism by which their compliance with the Preliminary Injunction can be assessed (Motion for Amendment and Execution of Preliminary Injunction Order, filed Feb. 28, 1990). Defendants have objected to plaintiffs' request (Defendants' Response in Opposition to Plaintiffs' Motion for Amendment and Execution of Preliminary Injunction Order, filed March 1, 1990). This Court has given full consideration to the evidence submitted at the preliminary injunction hearing in January 1989, the reports tendered by the parties as to the current status of defendants' caseworker

assignment system, the arguments of counsel and the relevant authorities. It is hereby ordered that:

1. Every Friday from and after June 15, 1990 defendants shall provide the Office of the Public Guardian (counsel for plaintiffs in this action) with a list of (a) all members of Class A whose cases in the Circuit Court of Cook County, County Department, Juvenile Division ("Juvenile Court") were commenced during the week ending the previous Friday and (b) all members of Class A who are subjects of previously-initiated Juvenile Court cases and for whom the previously-assigned caseworker relinquished or was relieved of responsibility during the week ending the previous Friday and (c) all members of Class A who are subjects of previously-initiated Juvenile Court cases and for whom the previously-assigned caseworker relinquished or was relieved of responsibility at any time up to and including the previous Friday and for whom a new caseworker assignment was made during the week ending the previous Friday.

2. For each child identified in a list referred to in Paragraph 1, defendants shall include in such list (a) the name of the previously assigned caseworker (if any) and the date his or her prior assignment ended and (b) the name and telephone number of the newly assigned caseworker (if any) and the date of his or her assignment.

Milton I. Shadur
United States District Judge

Date: April 3, 1990

ORIGINAL

Supreme Court, U.S.
FILED
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No. 90-1488

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

SUE SUTER, et al.,

Petitioners,

v.

ARTIST M., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Dated: April 19, 1991

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No. 90-1488

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

SUE SUTER, et al.,

Petitioners,

v.

ARTIST M., et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents Artist M., et. al, by their next friend, Patrick T. Murphy, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's opinion in this case.

JURISDICTION

On October 29, 1990, the Seventh Circuit affirmed orders of the District Court denying in part petitioners' motion to dismiss and granting respondents' motion for a preliminary injunction. The Court of Appeals denied petitioners' petition for rehearing with suggestion for rehearing en banc on December 20, 1990.

This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes at issue are 42 U.S.C. §§ 671(a) and 1983, which are included in the appendix.

STATEMENT OF THE CASE

This action arises out of the State of Illinois' practices of failing to make reasonable efforts to preserve and to reunite families and of failing to provide case plans, case reviews, and appropriate monitoring to children in its care, all as required by the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-628, 670-679a (the "AAA" or the "Act"). Petitioners, the Director and Guardianship Administrator of the Illinois Department of Children and Family Services ("DCFS" or the "Department"), purport to fulfill these obligations through a system of their own design -- namely, by assigning a caseworker to each child under their care or supervision. Petitioners, however, regularly fail to assign caseworkers to these children and their families. As a result, as both the District Court and the Court of Appeals recognized, petitioners systematically violate their obligations under the Act, Pet. App. 19a, 53a-54a, and children under their care and supervision suffer from:

> an increased likelihood that [their] families would be broken up or remain apart, that [they] would be deprived of protective services, and that, in the absence of timely case plans and case reviews, [they] would be left in unnecessarily restrictive or dangerous placements, denied...essential visits with their parents and place[d] at risk of further injury.

Pet. App. at 19a (internal quotations omitted). To remedy petitioners' violations of the AAA, the District Court entered a minimally intrusive preliminary injunction, which the Seventh Circuit affirmed on appeal.

Respondents are children who are abused or neglected by their parents or whose parents are unable to care for them for a variety of reasons. In each of their cases, DCFS files a petition for adjudication of wardship in the Circuit Court of Cook County, Illinois, County Department, Juvenile Division ("Juvenile Court"). Based on the recommendation of investigators with DCFS' Division of Child Protection ("DCP"), the Juvenile Court then places many of these children in the agency's custody. In the remaining cases, the Juvenile Court orders the child to remain at home under DCFS' supervision ("protective order cases"). App. at 9-10, paras. 1-3.[1]

Under the system designed by petitioners, DCP investigators provide no family preservation, family reunification, or other services to these children and their families. Instead, DCFS chooses to provide a caseworker to each child to fulfill its obligations under the Act. Consequently, when DCFS assumes custody of a child, one of its caseworkers must be assigned in order to maintain the child's family ties, work toward reunification, and ensure the child's well-being. To those ends, under DCFS' system, the caseworker must search for relatives qualified to care for the child or locate a suitable non-relative placement; arrange appropriate counseling; complete school

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[1] In apparent disregard of Supreme Court Rule 14.1(k)(ii), petitioners omitted from their appendix the District Court's findings of fact, its July 24, 1989 memorandum opinion and order, and orders entered by the Court of Appeals, prior to its decision, remanding the case to the District Court for additional factual findings. Accordingly, respondents have included each of those documents in their appendix.

transfers where appropriate so the child's education is not interrupted; arrange family visitation; provide appropriate medical care; and generally assure the child's safety. The caseworker is also responsible for developing a written, individualized case plan and advising the Juvenile Court of the condition of the child and the family. Id. at 9-11, paras. 2, 4.

Similarly, DCFS delegates to its caseworkers the responsibility of securing family preservation services in protective order cases. Under DCFS' system the caseworker alone is responsible for arranging individual or family counseling to ease or eliminate the crisis that led to the child's mistreatment; homemaker and housekeeping services so that the conditions of the home will not require the child's removal; substance abuse programs to enable parents to attend to their children's needs; help in obtaining food, shelter and medical care; and monitoring of the child's safety at home. Id. at 12, para. 6.

DCFS contracts with private agencies to provide services in some protective order and custody cases. In these cases DCFS and the private agency share the responsibility for delivering services. Together, the DCFS caseworker and the private agency prepare a case plan and provide an administrative case review. The DCFS caseworker, however, retains ultimate responsibility for all facets of the case. The DCFS caseworker also remains responsible for ascertaining whether there are appropriate relatives with whom to place a child. Moreover, certain private agencies are unable to provide necessary services (such as

psychiatric hospitalization for a suicidal child). In those cases the DCFS caseworker is responsible for obtaining and authorizing such services. The DCFS caseworker may also be required to consent to familial visits. Finally, the DCFS caseworker is responsible for planning for the long-term care of children, particularly when the private agency provides only a short-term placement. Id. at 12-13, paras. 7-8.

Until DCFS has assigned a caseworker, it provides no services to respondents or their families. For example, a young child in DCFS' custody may be denied visits with her parents or siblings for several weeks. Others may be left in inappropriate placements such as shelters, even when appropriate relatives are interested in caring for them. Without a caseworker, some children are denied essential sex abuse treatment, grief counseling or psychiatric care. Many more are unable to attend school. Finally, without a caseworker some children remain indefinitely in DCFS' custody without any plan for their case. Id. at 13-14, para. 9.

Children who reside at home under DCFS' supervision are also denied family preservation services and protection when no caseworker is assigned. For example, without caseworkers, children who come under DCFS' supervision because their parents fail to provide adequate food may go hungry again and have to leave home. Parents who are ordered to obtain drug treatment by the Juvenile Court and are willing to do so in order to keep their children get no assistance in locating and enrolling in a drug treatment program. Children who are without an assigned

caseworker to make home visits may be further abused by their parents and may have to be removed from their families. Id. at 14-15, para. 11. In short, under its own system, DCFS cannot fulfill the Act's reasonable efforts, case plan, case review, and monitoring requirements after it initiates a case without assigning a caseworker.

In such cases DCFS' failure to provide caseworker-initiated services promptly is particularly harmful. Because family members are the most motivated during a time of crisis, immediate intervention is essential. Thus, in custody cases, the likelihood that children whom DCFS separates from their families will return home is directly related to the speed with which they receive reunification services. The longer DCFS delays in providing such services during this critical period, the more likely it is that the child will never return home. Thus, the goal of family reunification becomes more remote and less attainable when no caseworker is assigned. Similarly, when children remain at home, DCFS' failure to quickly provide family preservation services places them at risk and often results in their removal from home.

At the time respondents filed their complaint, DCFS regularly failed to assign caseworkers capable of initiating child welfare services for them and their families, both in protective order and in temporary custody cases. In most cases DCFS did not assign a caseworker until at least two weeks after the first Juvenile Court date. In many others DCFS failed to assign a caseworker at all during the first 30 to 45 days. In

some cases this gap lasted even longer. Id. at 15, para. 13. In protective order cases, the Juvenile Court, at the request of DCP investigators, often scheduled the first court hearing for a future date. Yet even in those cases, with advance notice of the impending Juvenile Court case, DCFS regularly failed to assign a caseworker promptly after the court case commenced.

After petitioners did assign caseworkers to them, respondents often lost the benefit of the assignment when DCFS transferred or terminated their caseworkers or when their caseworkers took leaves of absence or resigned. In these cases DCFS simply failed to assign a caseworker to replace the previous one. As a result, these children were again left for significant periods of time without a caseworker, and thus without family reunification, family preservation, and other child welfare services. Id. at 16, para. 15.

According to DCFS' own records, at the end of September 1988, over 200 cases in Cook County had been without an assigned caseworker for more than 30 days. DCFS records in November 1988 showed that 320 cases in Cook County had been unassigned for over 30 days, that 83% of those had been unassigned for over 60 days and that 63 cases had been unassigned for over 100 days. On December 13, 1988, the head of DCFS' Cook County operations wrote that unassigned cases in Cook County were on the rise. Id. at 17, para. 17.

Despite these conditions, DCFS did nothing to expedite the assignment of caseworkers to fulfill its family preservation, family reunification, case plan, case review, and monitoring

obligations to children and their families. DCFS simply failed to require its personnel to assign cases promptly. It also failed to develop a policy or procedure for reassigning cases of caseworkers who resign, transfer, or are absent for substantial periods of time. On the contrary, DCFS deliberately chose not to reassign many such cases. In many other cases DCFS made "paper assignments" by assigning a caseworker in name only -- one incapable, because of the size of his or her caseload, of providing appropriate family preservation or family reunification services, participating in a case review, developing a case plan, or adequately monitoring the child's safety. Id. at 17-18, paras. 18-19.

On December 14, 1988, respondents filed their complaint in the United States District Court for the Northern District of Illinois. These children alleged that petitioners' failure to assign them caseworkers promptly violated their rights, and those of similarly situated children, under the Act. Respondents sought declaratory and injunctive relief, both directly under the Act, through an implied cause of action, and under 42 U.S.C. § 1983. A subclass of petitioners -- those in respondents' custody -- also complained of violations of their rights under the Due Process Clause of the United States Constitution. On the same day respondents filed motions for class certification and for a preliminary injunction. The District Court exercised jurisdiction over the case pursuant to 28 U.S.C. §§ 1331, 1343, 2201, and 2202.

After granting the motion for class certification and expediting discovery, the District Court conducted a three day hearing on respondents' motion for a preliminary injunction in January 1989. The evidence revealed systemic problems in DCFS' caseworker assignment practices as described above and the resultant violations of respondents' rights under the Act. Respondents also showed the harm suffered by individual children who were entrusted to DCFS' care and supervision. In response, DCFS' witnesses described the plan which they had developed to reorganize the Department, purportedly designed to ensure prompt caseworker assignment.

The District Court initially accepted DCFS' assurances regarding its reorganization plan. Consequently, it deferred ruling on respondents' motion for a preliminary injunction for well over a year.

By July 1989 DCFS had implemented three of the four elements of its plan:

(a) the Early Response Package, which reduced the paperwork necessary to transfer a case from DCP to a caseworker;

(b) the expansion of its Interim Services Team ("IST") program, designed to allow DCFS to assign all new custody cases promptly to an IST caseworker before transferring them shortly thereafter to an area office; and

(c) the Family First Initiative ("Family First"), designed to provide intensive services to children remaining at home with their parents.

On July 16, 1989 DCFS completed the final element of its plan, the reorganization of DCP. Id. at 19, para. 20.

As time passed, however, it became apparent that the District Court's faith in DCFS' plan had been misplaced. First, significant delays persisted in assigning caseworkers at the outset of cases. By petitioners' own admission, one fourth of the cases sent to IST were not assigned a caseworker promptly. In the remaining cases, DCFS did not even know when children were assigned a caseworker. Id. at 19-20, paras. 21, 25. DCFS also failed to reassign a caseworker once IST had relinquished responsibility for a case. Id. at 19-20, paras. 22-23.

Moreover, neither IST nor the Family First program functioned as planned. In July 1989 approximately one-third of the new custody cases went directly from DCP to area offices without IST intervention, despite petitioners' assertions that all such cases would first be sent to IST. In those cases DCFS failed to assign a caseworker until, on average, ten days after the first Juvenile Court date. As for Family First, DCFS regularly left children whose cases were initially assigned to that program without a caseworker -- without regard for their continuing need for one -- after Family First ended its two to three month association with the family. Id. at 20, para. 24.

DCFS' heralded reorganization plan also failed to address the gaps created when caseworkers resigned, transferred, were fired or took leaves of absence. If a caseworker were absent for less than 30 days, the supervisor merely monitored the case without handling the everyday service needs of the family. When

caseworkers were absent for longer periods, DCFS' policy and practice continued to permit supervisors to leave cases unassigned for 30 or more days. Given the number and frequency of transfers and the high turnover rate of DCFS caseworkers, DCFS' unwillingness to remedy that problem was especially dangerous. Children whose cases were reassigned during a caseworker's absence did not fare any better, because petitioners reassigned those cases en masse to a single caseworker. Given the nature and volume of the reassignments, the caseworker could not provide services to those children and their families. Id. at 21, paras. 26-27.

Finally, even after implementation of its plan, DCFS failed to hold anyone in the agency accountable for assigning a caseworker promptly. DCFS assigned Mark Moses to monitor caseworker assignment, but it did not require him to take action when he learned of unassigned cases. Gloria Lewis, DCFS' Associate Deputy Director for Cook County Operations and the supervisor of its four area offices, received monthly reports listing unassigned cases, but she had no responsibility for ensuring the assignment of caseworkers to those families. DCFS gave John Goad and Chris Benson the responsibility of monitoring compliance with the Early Response Package, but they reviewed DCFS' performance only twice in all of 1989. Id. at 21-22, paras. 28-29.

Thus, instead of developing appropriate internal checks, DCFS simply relied on its expectations -- "wishful thinking," in the words of the District Court -- that cases would be assigned.

Id. at 22, para. 29. But its wishful thinking was not enough. Despite its reorganization, DCFS continued to deprive children and their families of caseworkers and the services and protections required by the AAA, which under DCFS' system, only the caseworkers could provide.

In the face of these problems, petitioners filed a motion to dismiss respondents' complaint. On November 21, 1989, the District Court granted the motion only as it related to respondents' constitutional claims. The District Court denied the motion in all other respects, holding that respondents stated a cause of action under the AAA -- both through an implied cause of action and under § 1983 -- particularly with respect to the Act's reasonable efforts requirement. Pet. App. at 35a-44a. Nevertheless, the District Court continued to defer to DCFS' reorganization plan and invited the Department to apprise the court of any progress in its implementation.

DCFS, however, made no progress. In November 1989 the Department began sending all new cases -- not merely new custody cases -- to IST. Id. at 32, Stip. 16. But logs from January and February 1990 (finally revised to reflect the date of caseworker assignment) demonstrated continuing delays there. DCFS did not assign a caseworker within five days of the first Juvenile Court date -- its stated goal -- in 56 of approximately 150 cases sent to IST in those two months. In February 1990 alone DCFS failed to meet its own five-day goal in 40% of the cases sent to IST and in 60% of those not screened in advance. Twelve per cent

were left unassigned for more than three weeks. Id. at 23, paras. 33-34.

Moreover, DCFS continued to leave cases unassigned, on the average, for nearly three weeks after IST completed its tasks. DCFS also failed to improve its policies or its practices regarding the reassignment of cases in the area offices. As a result, when caseworkers were absent, DCFS left their former cases unassigned for an average of 30 days. Id. at 24, para. 35.

System-wide caseworker assignment problems grew as well. The total number of unassigned cases grew from 232 on June 30, 1989, to 404 by the end of the year, parallelling the pattern of 1988. The number of cases unassigned for over 30 days doubled during the same period of time. Id. at 24, para. 36.

The District Court ultimately concluded that DCFS, despite its reorganization plan, continued to violate the AAA. Based on the evidence it had received over the previous 14 months, the court concluded that respondents had satisfied each of the requirements for the issuance of a preliminary injunction. Thus, on March 2, 1990, the District Court entered a preliminary injunction which prohibited petitioners from:

> (a) failing to assign a caseworker capable of providing child welfare services to each of the plaintiffs and their families within three working days of the time that plaintiffs' cases are first heard in Juvenile Court; and
>
> (b) failing to assign a caseworker capable of delivering child welfare services within three working days of the time that a previously assigned caseworker relinquishes responsibility for any portion of a case.

Pet. App. at 56a. Petitioners then appealed.

The Seventh Circuit affirmed the District Court in an opinion entered on October 29, 1990. The court below first affirmed the District Court's November 21, 1989 holding that respondents could enforce the AAA, both through an implied cause of action under the Act and under § 1983. The court then upheld the injunction as fully supported by the evidence. On December 20, 1990, the Seventh Circuit denied DCFS' petition for rehearing.

REASONS FOR DENYING THE WRIT

This Court should deny the petition for a writ of certiorari. First, petitioners seek, in essence, an advisory opinion from this Court. They question only the Court of Appeals' decision affirming respondents' right to enforce the AAA under § 1983. They leave unchallenged the court's clearly articulate and equally correct holding that regardless of § 1983, respondents were entitled to the relief granted by the District Court under the AAA through an implied cause of action. Pet. App. 14a-18a. This Court's review, however, is limited to questions properly presented in the petition. Sup. Ct. R. 14.1(a). Therefore, regardless of how this Court answers the questions petitioners do present, the Court of Appeals' affirmance -- given its independent foundation in its implied cause of action holding -- must stand.

In addition, the decision below was correct and consistent with the decisions of this Court, the other courts of appeals, and the state courts. The Court of Appeals properly applied Wilder v. Virginia Hospital Association, ___ U.S. ___, 110 S. Ct. 2510 (1990), this Court's most recent § 1983 decision

regarding the Social Security Act (of which the AAA is a part), to the facts of this case. It correctly held that the respondents are beneficiaries of the AAA; that the AAA imposes binding obligations on States accepting its funding; and that the AAA's provisions are neither too vague nor too amorphous to be unenforceable. Pet. App. at 9a-13a. Thus, with Wilder clearly applicable here -- and in light of the broad construction to be afforded § 1983, Golden State Transit Corp. v. Los Angeles, 493 U.S. ___, 110 S. Ct. 444, 448 (1989) -- the Court of Appeals correctly concluded that respondents in DCFS' custody or under its supervision could enforce the requirements of the AAA.

Finally, the Court of Appeals' holding will have, at most, minimal impact on other States. The court held that when a State receiving funds under the AAA assigns to caseworkers exclusively the responsibility of making reasonable efforts and systematically fails to assign caseworkers to abused and neglected children and their families, a court may remedy that systemic deficiency by entering a minimally intrusive preliminary injunction. Id. at 16a-18a. Moreover, the injunction here is dependent on complex facts -- reviewed extensively by the District Court and again by the Court of Appeals -- regarding Illinois' own child welfare policies and practices. In view of the AAA's deference to States, those policies and practices are unlikely to recur elsewhere, thereby minimizing the import of the Court of Appeals' decision. Given these reasons, and given this Court's presumption against reviewing interlocutory orders, Goldstein v. Cox, 396 U.S. 471, 478 (1970), certiorari should be denied.

I. PETITIONERS HAVE NOT PROPERLY CHALLENGED ONE OF THE TWO INDEPENDENT GROUNDS FOR THE COURT OF APPEALS' DECISION, THEREBY RENDERING CERTIORARI INAPPROPRIATE.

A. Petitioners Have Waived Review of the Court of Appeals' Holding That Children May Enforce the AAA Through an Implied Cause of Action.

In affirming the preliminary injunction, the Seventh Circuit expressly and independently held that children in DCFS' custody and children under DCFS' supervision may enforce the AAA directly through an implied cause of action. The court correctly applied the four-part test of Cort v. Ash, 422 U.S. 66, 78 (1975), and found that respondents stated a cause of action independent of their rights under § 1983: "[E]ven if the plaintiffs could not pursue their claims under Section 1983, we conclude that the AAA contains an implied private right of action." Pet. App. at 14a.[2]

Nonetheless, petitioners fail to raise this issue for review in accordance with Supreme Court Rule 14.1(a). Instead, they question only the enforceability of 42 U.S.C. § 671(a)(15) under § 1983 and the right of abused and neglected children who remain at home to enforce the AAA. Pet. at i. Indeed, petitioners never even acknowledge, let alone dispute, the Seventh Circuit's reliance on an implied cause of action in its decision to uphold the injunction.

Petitioners mention respondents' implied cause of action but once in the entire petition, and then only in a footnote. Id. at

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[2] The District Court also found that respondents could pursue their claims directly under the Act through an implied cause of action, Pet. App. at 35a-41a, and relied on that analysis in entering the preliminary injunction. Id. at 54a.

7 n.1. Yet even there, petitioners fail to present the issue in a way which would justify its review. Petitioners, purportedly relying on Wilder, erroneously equate the analysis under Cort v. Ash with that which governs cases arising under § 1983. Yet this Court in Wilder explicitly differentiated the two lines of cases. As this Court stated, the § 1983 analysis "is a different inquiry from that involved in determining whether a private right of action can be implied from a particular statute." 110 S. Ct. at 2517 n.9.

In sum, applying Supreme Court Rule 14.1(a) here, petitioners have waived review of the Court of Appeals' holding that children in DCFS' custody or under its supervision may enforce the Act directly through an implied cause of action. Since that question is neither "set forth in the petition, [nor] fairly included therein, [it should not] be considered by this Court." Id. See also Jones v. Hildebrant, 432 U.S. 183, 184-85, 188-89 (1977); Berkemer v. McCarty, 468 U.S. 420, 443 n.38 (1984).

B. Petitioners' Failure to Question Respondents' Implied Cause of Action Renders Certiorari Inappropriate.

Because petitioners have failed to challenge both of the Court of Appeals' holdings in accordance with Supreme Court Rule 14.1(a), this Court should deny their petition. As this Court has made clear, certiorari is inappropriate when, as here, a petitioner challenges only one of two independent grounds of a court of appeals' decision. The Monrosa v. Carbon Black Export,

359 U.S. 180, 183 (1959). Moreover, the Court of Appeals, like the District Court, clearly and plainly stated that its decision rested independently on its holding regarding respondents' implied cause of action -- making certiorari even less appropriate in this case. See Illinois v. Rodriguez, ___ U.S. ___, 110 S. Ct. 2793, 2798 (1990); Michigan v. Long, 463 U.S. 1032, 1041 (1983). Because the decision below will stand regardless of how this Court answers the questions presented by petitioners, granting certiorari here would require this Court to render an advisory opinion -- which it may not do under Article III's "case or controversy" requirement. Id. at 1042. Thus, in light of the "commitment of scarce judicial resources" which certiorari entails, City of Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985), this Court should deny the petition.

II. THE COURT OF APPEALS CORRECTLY DECIDED THE QUESTIONS PRESENTED BY PETITIONERS.

Turning to the questions which petitioners have presented, the Court of Appeals correctly decided each. The court, in addressing them, followed Wilder, this Court's most recent application of § 1983 to the Social Security Act and its most relevant case here. Petitioners fail to raise any responsive argument not already properly addressed by the court below. Therefore, for this reason as well, certiorari should be denied.

A. The Court of Appeals Properly Applied Wilder in Holding That Children May Enforce the AAA's Reasonable Efforts Requirement.

In Wilder this Court articulated the standard which governs here, stating that a statutory provision, (1) if intended to

benefit a putative plaintiff, creates an enforceable right under § 1983:

> [(2)] unless it reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the governmental unit, or [(3)] unless the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce.

110 S. Ct. at 2517 (citations and internal quotations omitted). See also Dennis v. Higgins, ___ U.S. ___, 111 S. Ct. 865, 871-72 (1991); Golden State, 110 S. Ct. at 448. Notwithstanding petitioners' assertions to the contrary, the Court of Appeals properly applied these three tests and correctly held that under § 1983, children who are repeatedly and regularly denied caseworkers under Illinois' child welfare system may enforce the AAA's reasonable efforts requirement.

First, the Court of Appeals stated that Congress clearly intended to benefit respondents in enacting the AAA, Pet. App. at 10a, a statement which petitioners neither can nor do dispute.[3] Second, the court correctly determined that the Act's reasonable efforts requirement imposes a binding obligation on DCFS. Id. at 10a-11a. As Judge Cummings stated, the reasonable efforts requirement, like the case plan, case review and monitoring

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[3] After criticizing the Seventh Circuit for allegedly ignoring the Wilder test, Pet. at 8, petitioners themselves disregard this first prong of Wilder altogether. See, e.g., Pet. at 11, 14 (referring to "two-pronged test"). But as this Court made clear in Dennis, its most recent § 1983 decision on this issue, a court must ascertain whether the plaintiff is a beneficiary of a statute in order to determine its enforceability. 111 S. Ct. at 871-72.

requirements, is "set[] forth in mandatory language" and is "tied indisputably to the funding provision." Id.

Petitioners first concede, Pet. at 13, and then (in remarks irrelevant to the question they seek to address) dispute the mandatory nature of the AAA's reasonable efforts requirement. Pet. at 17. But the language of the Act fully supports the Seventh Circuit's conclusion. The reasonable efforts requirement is an express and unconditional part of the contract between the State and the federal government and is included among the conditions which a State must satisfy in order to qualify for federal funds. In the provision entitled "Requisite features of State plan," the Act states, "In order for a State to be eligible for payments under this part, it shall have a plan...which... provides that, in each case, reasonable efforts will be made...." 42 U.S.C. § 671(a) (emphasis added). After focusing primarily and extensively on this and other language of the statute, Pet. App. at 6a-8a, 10a-11a, the Court of Appeals properly concluded that the Act binds States accepting its funding to make reasonable efforts. See Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 13 (1981) (courts are required to look first and foremost to language of a statute in assessing its enforceability).

The Act's legislative history provides further support for concluding that the reasonable efforts provision is privately enforceable by individuals. For example, prior to the Senate vote on the Act on June 13, 1980, Senator Cranston, the Act's

sponsor,[4] explained that the then-current statute contained only "very generalized provisions" regarding family preservation and reunification services and that those provisions had "had little specific impact upon a State's responsibility to provide services designed to prevent a child's removal from his or her home, or to help alleviate the problem which caused the child's removal in the first place." 126 Cong. Rec. 14766-67 (June 13, 1980). In contrast, he stated, the AAA "provide[s] specific requirements that states must include" in their State plan "to assure that in each case reasonable efforts be made...." Id. (emphasis added). Elsewhere, the legislative history supports the same conclusion. See, e.g., infra at 26-28. Thus, the Court of Appeals correctly concluded that through the reasonable efforts provision, Congress intended to and did impose a binding obligation on the States.

Looking to the third prong of Wilder, the Court of Appeals correctly determined that the right to reasonable efforts is sufficiently explicit to be judicially enforceable. Pet. App. at 11a-13a. In Wilder this Court stated:

> That the [Boren] Amendment gives the States substantial discretion in choosing among reasonable methods of calculating rates may affect the standard under which a court reviews whether the rates comply with the Amendment, but it does not render the Amendment unenforceable by a court. While there may be a range of reasonable rates, there certainly are some rates outside that range that no State could ever find to be reasonable and adequate under the Act.

110 S. Ct. at 2523 (emphasis in original).

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[4] As this Court has noted, in interpreting an act of Congress, the statements of the act's sponsor should be given substantial weight. Federal Energy Administration v. Algonquin SNG, 426 U.S. 548, 564 (1976).

In a parallel and searching approach, the Court of Appeals here acknowledged that "DCFS has substantial discretion in choosing the method it will use to implement the requirements of the AAA." Pet. App. at 12a. The court recognized and accepted that DCFS, in exercising that discretion, had chosen "to use caseworkers as the means through which these services are provided." Id. at 11a. Tracing Wilder's analysis, the court below then looked at DCFS' existing caseworker assignment process, as described by the District Court in its findings of fact. It then demonstrated how a court could easily assess whether DCFS' complete failure to assign caseworkers promptly comports with the Act's reasonable efforts requirement:

> [A]lthough a caseworker does not herself provide services, caseworkers are necessary to arrange for the provision of services by others. The caseworker is a "lifeline." When the caseworker is absent, no efforts can be exerted for preventive and reunification services.

Id. at 11a-12a. (citations omitted).

The Seventh Circuit, again relying on Wilder, then correctly stated that in such circumstances, "[t]he judiciary is...capable of determining whether the state is exerting 'reasonable efforts' to provide [the] services" required by the AAA. Id. at 12a. And here, the District Court correctly made that determination based on an extensive factual record -- a record showing that DCFS fails to make reasonable efforts in each case as a result of its failure to assign caseworkers to children and their families.

Petitioners assert that the AAA is unenforceable, relying on the Act's purported lack of an "objective benchmark" to measure

the reasonableness of DCFS' efforts. Pet. at 14. As the Court of Appeals recognized, petitioners are wrong. Applying the Act to the facts of this case, there is no ambiguity about the unreasonableness of petitioners' efforts to preserve and to reunite families. Because no caseworkers are assigned to the respondents, no efforts are expended at all. Pet. App. at 12a, 19a. Even if a "benchmark" might be helpful in construing the AAA's reasonable efforts requirement in other circumstances, no court would need any "benchmark" to enforce the Act here or to determine that these facts entail a violation of the Act's mandates. Moreover, as the Seventh Circuit recognized, Pet. App. at 7a, n.10, to the extent an "objective" reference point is required, federal regulations setting forth preventive and reunification services, 45 C.F.R. § 1357-15(e)(2), provide guidance comparable to the regulations mentioned in Wilder: the "factors which a State must consider in adopting its rates." 110 S. Ct. at 2522 (emphasis added).

Petitioners also attempt to distinguish Wilder from the decision below by pointing to the "substantial discretion" that the AAA provides to States in their implementation of its requirements. Pet. at 14 n.3, 18. They thereby ignore (at best) or misrepresent (at worst) this Court's recognition in Wilder of the "substantial discretion" afforded States by the Boren Amendment. 110 S. Ct. at 2523. In fact, the AAA provides States less discretion than that provided them under the Boren Amendment. Compare 42 U.S.C. § 671(a) (requiring the Secretary

to approve plan) with id. at 1396a(a)(13)(A) (requiring the Secretary only to find States' assurances satisfactory).

In a further attempt to distinguish it from this case, petitioners also misconstrue Wilder in their discussion of the Boren Amendment. Pet. at 13-14. The Boren Amendment requires States to set reasonable rates with reference to efficiently and economically operated facilities, as petitioners recognize; but it also includes a requirement, which the plaintiffs in Wilder sought to enforce and which petitioners here omit, that States "assure (sic) that individuals eligible for medical assistance have reasonable access...to inpatient hospital services of adequate quality." 42 U.S.C. § 1396a(a)(13)(A). Neither the statute nor the implementing regulations define "reasonable access" or "adequate quality." See e.g., 48 Fed. Reg. 56049 (1983) (rejecting proposal to define "reasonable access"). This Court in Wilder nevertheless concluded that courts are competent to determine both whether a State has set reasonable rates and whether it has ensured reasonable access to medical care of adequate quality. 110 S. Ct. at 2523.

Finally, Illinois' actions in the wake of Congress' enactment of the AAA in 1980 belie petitioners' suggestion that the reasonable efforts provision is too ambiguous to be considered part of the State's contract with the federal government. In 1985 the Illinois legislature amended the State's Juvenile Court Act to require judges to find that reasonable efforts were made before placing a child in DCFS' custody. P.A. 83-1517 (amending predecessor version of Ill. Rev. Stat. ch. 37,

para. 802-10). More importantly, two years later, the Illinois legislature enacted the Family Preservation Act, P.A. 85-985, which among other things, requires DCFS to provide family preservation services to families whose children have been removed or are at risk of being removed and to develop and implement a plan to make such services available throughout the State. Ill. Rev. Stat. ch. 23, paras. 2058.2, 5005, 5006a. See also DCFS Policy Guide 91.1 (March 28, 1991) (identifying services to meet reasonable efforts requirement in environmental neglect and domestic violence cases). Thus, with DCFS having accepted millions of dollars from Congress under the Act, petitioners cannot now claim ignorance. DCFS has long known that reasonable efforts are required of it under its AAA contract with the federal government.

Having correctly applied Wilder here, the Court of Appeals properly concluded that Congress created enforceable rights in the AAA's reasonable efforts requirement. Rather than render that provision meaningless, the Court of Appeals interpreted it to give full effect to the clearly expressed intent of Congress. See Wilder, 110 S. Ct. at 2519-20.

B. The Court of Appeals Correctly Held That Children Living At Home Under DCFS' Supervision Have Enforceable Rights Under the Act.

Having properly found that children have a right to reasonable efforts under the Act, the Court of Appeals declined to carve out a special exception for children at home under DCFS' supervision. As Judge Cummings stated, "the language of that statute does not reveal an intention by Congress to limit its

terms only to children actually in foster care outside the home, and the DCFS fails to provide a compelling reason to read such a distinction into the statute." Pet. App. at 18a (citation omitted).

The court's holding is well supported by the language and history of the AAA. First, Congress' emphasis on leaving children at home, on returning children to their homes as soon as possible, and on services to meet both these ends resounds throughout the AAA. Indeed, family preservation and family reunification are together a primary objective of the Act. Thus, the Act expressly imposes upon DCFS a binding obligation to make reasonable efforts to keep children at home prior to placing them in foster care. 42 U.S.C. § 671(a)(15). Other provisions of the Act also show the importance of the States' efforts to keep children at home. See, e.g., id. at § 627(b)(3) (requiring preplacement preventive service program); id. at § 672(a)(1) (requiring judicial determination that State made reasonable efforts prior to placing child in foster care).

Second, the Act's legislative history supports the Court of Appeals' holding. As Senator Cranston's remarks show, Congress enacted the AAA primarily to protect children against being removed unnecessarily from their homes and to minimize the human and financial costs which their removal entails:

> The human costs of failing to take whatever steps are available to prevent the removal of a child from his family are beyond calculation. The financial cost of placing a child in long term foster care -- running as high as $30,000 a year for institutional placements -- can become enormous,

> particularly in contrast to the cost of preventive services which could avert the necessity for removal or continued removal of the child.

125 Cong. Rec. 22686 (Aug. 3, 1979). Senator Cranston described the importance of the family preservation requirement even more forcefully on other occasions:

> [W]here removal can be prevented through the provision of home-based services, these agencies will be required to provide such services before removing the child and turning to foster care. These provisions... are among the most important aspects of this legislation. Far too many children and families have been broken apart when they could have been preserved with a little effort.

Id. at 14767 (June 13, 1980).[5] See also id. at 22683 (August 3, 1979) (reasonable efforts provision "critical to our efforts to reform the foster care system"). Other parts of the legislative history provides further support for the Court of Appeals' holding. See, e.g., H. R. Cong. Rep. 96-900, 96th Cong., 2d Sess. 46, reprinted in (1980) U.S. Code Cong. & Ad. News 1566 ("State plan must provide that in each case...reasonable efforts will be made..."); 126 Cong. Rec. 14645 (June 13, 1980) (Congressman Conable: funds conditioned on State providing

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[5] With these remarks, Senator Cranston integrated the Act's requirement that States make reasonable efforts to prevent children's placement with two provisions which petitioners conceded below to be fully enforceable -- the case plan and case review requirements. Like the structure of the Act itself, see 42 U.S.C. § 671(a)(15), (16), Senator Cranston's statement, made on the date of the Act's passage, shows Congress' intention that the three provisions be treated similarly and supports a finding that the reasonable efforts provision, like the case plan and case review provisions, is fully enforceable.

"services to preserve families"; Congressman Rousselot: States must make "every effort" to preserve families).

Petitioners ignore Congress' decision to provide the States over $300 million to fund family preservation services -- in contrast to the mere $1.6 million which Congress allocated to provide "appropriate" treatment in the "least restrictive" setting in Pennhurst State School and Hospital v. Halderman. 451 U.S. 1, 24 (1980). Petitioners then suggest that Congress' decision to fund preventive services in the Act through what is now Title IV-B of the Social Security Act, as opposed to through Title IV-E, somehow renders the rights of children residing at home unenforceable. Pet. at 19-20. Petitioners thereby demonstrate an appalling lack of understanding of the central purpose of the entire Act -- family preservation. The Court of Appeals gave petitioners' argument the short shrift it deserved. Given the clarity with which Congress has spoken in imposing this obligation upon States, the Court of Appeals properly elected not to second-guess the method by which Congress chose to defray their costs in meeting it. Pet. at 18a.

III. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH OTHER DECISIONS OF THIS COURT, THE COURTS OF APPEALS AND STATE COURTS.

Given its adherence to the Golden State-Wilder-Dennis test, the Court of Appeals' decision is consistent with this Court's rulings in other § 1983 cases. Likewise, the court's ruling is fully consistent with those in other circuits and in the state courts holding that the AAA, including its reasonable efforts

provision, is fully enforceable. Consequently, petitioners' claim of a conflict of decisions is meritless.

A. The Court of Appeals' Decision Is Consistent with this Court's Rulings in Other § 1983 Cases.

The opinion below fully comports with this Court's decisions in other § 1983 cases preceding Golden State, Dennis, and Wilder. In Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987), for example, this Court held that federal regulations conferred upon tenants of federally subsidized housing the right to a reasonable allowance for utilities, a right which those individuals could privately enforce under § 1983. Id. at 423-32. Despite petitioners' claim to the contrary, the "guidelines" set out in the federal regulation relied upon in Wright, id. at 437 (O'Connor, J., dissenting), are no more concrete and directive than the "examples" of preventive and reunification services set forth at 45 C.F.R. § 1357.15(e)(2). See also supra at 23.

The opinion in this case is also consistent with Pennhurst, in which this Court construed 42 U.S.C. § 6010, the "bill of rights" in the Developmentally Disabled Assistance and Bill of Rights Act. This Court there found that Congress had not conditioned receipt of funding upon compliance with § 6010 and that the provision "does no more than express a congressional preference" for the policies there articulated. 451 U.S. at 19, 22-24. Based on its precatory nature, this Court refused to find the bill of rights enforceable. See also Wilder, 110 S. Ct. at 2518 (discussing grounds of Pennhurst decision).

By contrast, the provisions petitioners violate here are specific requirements "tied indisputably to the funding provision...[,] readily distinguish[ing this case] from Pennhurst...." Pet. at 11a. Indeed, Congress' words here could not be more clear: "In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which..." provides that it will make reasonable efforts in each case prior to a child's placement to prevent her removal and after placement to facilitate her return to her home. 42 U.S.C. § 671(a)(15) (emphasis added). Likewise, in contrast to Pennhurst, 451 U.S. at 23, the AAA expressly authorizes the Department of Health and Human Services to withhold funding if the Secretary finds that a State has failed to comply with the reasonable efforts requirement, 42 U.S.C. § 671(b) -- "support[ing] the conclusion that the provision does create enforceable rights." Wilder, 110 S. Ct. at 2520. In short, as Pennhurst requires, in the AAA Congress spoke with a clear voice; with a command, not merely with a nudge. 451 U.S. at 17, 19.

B. The Court of Appeals' Decision Is Consistent with Decisions of Other Circuits Holding the Act To Be Enforceable.

Other courts of appeals which have considered the issue have each held that courts may enjoin violations of the AAA through § 1983. Timmy S. v. Stumbo, 916 F.2d 312, 315-16 (6th Cir. 1990) (granting injunction under § 1983 as remedy for unlawful exclusion of foster parents from administrative hearings); L.J. v. Massinga, 838 F.2d 118, 122-123 (4th Cir. 1988), cert. denied, 488 U.S. 1018 (1989) (granting injunction to remedy violation of

case plan, case review and reporting requirements); Lynch v. Dukakis, 719 F.2d 504, 509-12 (1st Cir. 1983) (granting injunction to remedy violation of case plan and case review requirements). See also Sockwell v. Maloney, 431 F. Supp. 1006 (D. Conn. 1976), aff'd, 554 F.2d 1236 (2nd Cir. 1977) (granting injunction under § 1983 for unlawful suspension of foster care payments under the AAA's predecessor).

Cases cited by petitioners are inapposite. In In re Scott County Master Docket, the District Court, applying the reasonable efforts mandate, concluded only that the State was not required, given the sexual abuse involved in that case, to maintain the children in their homes or return them to their families. 672 F.Supp. 1152, 1202-03 (D. Minn. 1987), aff'd sub nom. Myers v. Scott County, 868 F.2d 1017 (8th Cir. 1987). If anything, Scott County undermines petitioners' claims that federal courts are unable to apply the reasonable efforts mandate, and that the analysis undertaken below was unprecedented. See also infra at 35-36. Harpole v. Arkansas Department of Human Services, 820 F.2d 923 (8th Cir. 1987), is also readily distinguishable. There, in an abbreviated discussion, the court focused primarily on the appropriateness of the remedy sought, holding that an individual indirectly injured by the State's alleged violations of the Act could not seek damages in her case. Id. at 928.

Similarly, the alleged "uncertainty" among the district courts does not justify certiorari here. Pet. at 8-9. First, outside of the Seventh Circuit, the only district court to address the issue held the reasonable efforts requirement fully

enforceable. R.C. v. Hornsby, No. 88-D-1170-N, slip op. at 13-20 (M.D. Ala. April 19, 1989). Second, within the Seventh Circuit, the court below firmly resolved whatever conflict there may have been. Third, the pendency of other reasonable efforts cases in federal court renders certiorari even less appropriate. With only one court of appeals having addressed the enforceability of 42 U.S.C. § 671(a)(15), the issue -- if one exists -- is not ripe for this Court's review.

C. The Court of Appeals' Decision Is Fully Consistent with the Decision of State Courts Enforcing the AAA's Reasonable Efforts Requirements.

Certiorari is also inappropriate because the Court of Appeals' decision is consistent with those of state courts. State courts addressing the issue have been nearly unanimous in enforcing the Act's reasonable efforts requirement. See, e.g., In the Interest of Burns, 519 A.2d 638, 647-49 (Del. 1986); In the Interest of M.H., 444 N.W. 2d 110, 113 (Iowa App. 1989); In the Interest of Kenny F., 786 P.2d 699, 703-04 (N.M. App. 1990); In the Interest of S.A.D., 555 A.2d 123, 127-28 (Pa. Super. 1989). But see In re Carl O., 523 A.2d 1339, 1343 (Conn. App. 1987).

Other state courts have shown a similar inclination, enforcing state law provisions requiring reasonable efforts without hesitation. See, e.g., In re Victoria M., 255 Cal. Rptr 498, 503-05 (Cal. App. 1989) (reversing order terminating parental rights based on lack of reasonable efforts to reunite family); In the Interest of A.B., 444 So. 2d 981, 995-96 (Fl. App. 1983) (reversing dispositional order based on State's

failure to show reasonable services were provided to reunite family); In the Matter of Jones, 436 N.E.2d 849, 851 (Ind. App. 1982) (affirming termination of parental rights after finding reasonable services had been offered); In the Interest of A.M.K., 723 S.W.2d 50, 52-53 (Mo. App. 1986) (same); Matter of Sheila G., 462 N.E.2d 1139, 1140-41, 1150 (N.Y. 1984) (directing dismissal of termination petition based on agency's failure to provide reunification services to father); In re Nicole G., 577 A.2d 248 (R.I. 1990) (directing State to provide housing assistance in fulfillment of reasonable efforts obligation).

In short, the Court of Appeals decision is fully consistent with the decisions of state courts and other courts of appeals and prior decisions of this Court. Therefore, this Court should deny the petition.

IV. GIVEN ITS NARROW HOLDING, THE SEVENTH CIRCUIT'S DECISION WILL HAVE MINIMAL IMPACT ON OTHER STATES' CHILD WELFARE SYSTEMS.

The Seventh Circuit's holding was extremely narrow and limited to the unique set of facts before it. As a result, the court's decision will have little impact beyond the litigants and will have little or no effect on other States' child welfare systems. Therefore, this Court should not grant certiorari.

Before entering the injunction, the District Court conducted a lengthy hearing on respondents' motion for a preliminary injunction. It also considered petitioners' attempts to reorganize the Department, purportedly to remedy the system-wide problems depicted at the hearing. Finally, it reviewed lengthy submissions by the parties regarding DCFS' caseworker assignment

practices from July 1989 through February 1990. In short, the District Court entered its order only after an extensive and detailed review of the facts in dispute.

Based on its review, the District Court concluded that DCFS arranges for services for children and their families by assigning them caseworkers. App. at 9-12, paras. 2, 4, 6. Without a caseworker, the Department exerts no efforts to prevent the removal of children from their homes or reunite children with their families. Id. at 11-15, paras. 5, 9, 11. At the time of the hearing, DCFS regularly failed to assign caseworkers promptly. Id. at 15-18, paras. 13-19. Despite DCFS' reorganization, the Department continued to leave children without caseworkers regularly in late 1989 and early 1990. Id. at 19-24, paras. 21-27, 31-36. As a result, and given DCFS' reliance on caseworkers, children were irreparably harmed and denied the services to which they were entitled under the Act. Pet. App. at 53a-54a.

Endorsing the District Court's extensive findings of fact, id. at 5a, the Court of Appeals' holding was appropriately narrow: when a State assigns exclusively to its caseworkers the responsibility for making reasonable efforts to preserve and reunify families but regularly and systematically fails to assign them to abused and neglected children under its care or supervision, a court may remedy that systemic deficiency by entering a minimally intrusive preliminary injunction. Id. at 16a-17a. Thus, as its initial remand order portended, the Court of Appeals shaped its decision to closely fit the facts of this

case. Indeed, the injunction upheld below was fully consistent with the manner in which the State had exercised its discretion in attempting to meet its obligations under the Act. Compare id. with Wilder, 110 S. Ct. at 2525 (Rehnquist, C.J., dissenting).

On the other hand, in view of the discretion afforded all States under the AAA, similarly detailed findings of fact showing the vital role of caseworkers and systemic deficiencies in a State's caseworker assignment system may never be seen beyond Illinois' borders. See Winston v. Children and Youth Services of Delaware County, 748 F.Supp. 1128, 1133 (E.D. Pa. 1990) (no uniformity required in State systems for fulfilling reasonable efforts requirement). Therefore, the court's decision below will have only minimal effect on other States' child welfare systems.

Likewise, nothing in the Court of Appeals' decision suggests any erosion of the federal court's deference to the expertise of child welfare agencies, and nothing in the recognition of respondents' rights under the Act conflicts with this deference. Petitioners fail to justify certiorari with their "avalanche" argument, which Judge Cummings fully addressed:

> The district court's injunctive relief does not dictate a method of assigning caseworkers or interfere with the ability of caseworkers to exercise their own professional judgment on the job. The court is not creating federally enforceable rights to beds, monetary assistance, or housing. The injunction merely fulfills the minimal requirement of the AAA that reasonable efforts are made toward the goals of reducing unnecessary foster care placement and family disruption, and it does so through a method designed to maximize DCFS decisionmaking.

Pet. App. at 16a-17a.[6] Indeed, far from being an "unprecedented expansion" of the role of federal courts, Pet. at 21, the injunction here is consistent with and no more intrusive than the First Circuit's decision in Lynch. 719 F.2d at 514.

The federal courts' role in State's child welfare decisions is minimized by other considerations. The doctrines of collateral estoppel and abstention, for example, would regularly bar the federal court from "second-guessing" decisions in individual cases already active in a state court. See, e.g., Gardner v. Parson, 874 F.2d 131, 142 (3rd Cir. 1989) (AAA-based family preservation claim collaterally estopped by finding in Family Court proceedings). Moreover, any plaintiff surviving such hurdles may still be obligated to demonstrate systemic deficiencies in a State's plan (such as those shown in this case by respondents), as opposed to individual mistakes by individual caseworkers. 42 U.S.C. § 671(a). Finally, under Wilder, certain other plaintiffs may be unable to overcome the deference required of a court in its review of a State's compliance with the reasonable efforts requirement. 110 S. Ct. at 2523. Consequently, this Court should disregard petitioners' contentions that the decision below will overwhelm the federal courts with child welfare litigation.

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[6] As the Court of Appeals noted, the district court also took steps on its own to ensure that the injunction would be only minimally intrusive. Pet. App. at 12a-13a. The District Court refused to place a numerical limit on caseload size as requested by respondents and included in the injunction the three day benchmark set by petitioners themselves. Id. at 21-22, para. 37; id. at 55a, n.3.

CONCLUSION

For these reasons, the petition for certiorari should be denied.

Respectfully Submitted

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APPENDIX

STATUTES INVOLVED

1. 42 U.S.C. § 671(a):

Requisite features of State plan.

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which --

(1) provides for foster care maintenance payments in accordance with section 672 of this title and for adoption assistance in accordance with section 673 of this title;

(2) provides that the State agency responsible for administering the program authorized by part B of this subchapter shall administer, or supervise the administration of, the program authorized by this part;

(3) provides that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

(4) provides that the State shall assure that the programs at the local level assisted under this part will be coordinated with the programs at the State or local level, assisted under parts A and B of this subchapter, under subchapter XX of this chapter, and under any other appropriate provision of Federal law;

(5) provides that the State will, in the administration of its programs under this part, use such methods relating to the establishment and maintenance of personnel standards on a merit basis as are found by the Secretary to be necessary for the proper and efficient operation of the programs, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, or compensation of any individual employed in accordance with such methods;

(6) provides that the State agency referred to in paragraph (2) (hereinafter in this part referred to as the "State agency") will make such reports, in such form and containing such information as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to assure the correctness and verification of such reports;

(7) provides that the State agency will monitor and conduct periodic evaluations of activities carried out under this part;

(8) provides safeguards which restrict the use of or disclosure of information concerning individuals assisted under the State plan to purposes directly connected with (A)

the administration of the plan of the State approved under this part, the plan or program of the State under part A, B, C, or D of this subchapter or under subchapter I, V, X, XIV, XVI (as in effect in Puerto Rico, Guam, and the Virgin Islands), XIX, or XX of this chapter, or the supplemental security income program established by subchapter XVI of this chapter, (B) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of any such plan or program, (C) the administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, or services, directly to individuals on the basis of need, and (D) any audit or similar activity conducted in connection with the administration of any such plan or program by any governmental agency which is authorized by law to conduct such audit or activity; and the safeguards so provided shall prohibit disclosure, to any committee or legislative body (other than an agency referred to in clause (D) with respect to an activity referred to in such clause), of any information which identifies by name or address any such applicant or recipient; except that nothing contained herein shall preclude a State from providing standards which restrict disclosures to purposes more limited than those specified herein, or which, in the case of adoptions, prevent disclosure entirely;

(9) provides that where any agency of the State has reason to believe that the home or institution in which a child resides whose care is being paid for in whole or in part with funds provided under this part or part B of this subchapter is unsuitable for the child because of the neglect, abuse, or exploitation of such child, it shall bring such condition to the attention of the appropriate court or law enforcement agency;

(10) provides for the establishment or designation of a State authority or authorities which shall be responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes, including standards related to administration policies, safety, sanitation, and protection of civil rights, and provides that the standards so established shall be applied by the State to any foster family home or child care institution receiving funds under this part or part B of this subchapter;

(11) provides for periodic review of the standards referred to in the preceding paragraph and amounts paid as foster care maintenance payments and adoption assistance to assure their continuing appropriateness;

(12) provides for granting an opportunity for a fair hearing before the State agency to any individual whose

claim for benefits available pursuant to this part is denied or is not acted upon with reasonable promptness;

(13) provides that the State shall arrange for a periodic and independently conducted audit of the programs assisted under this part and part B of this subchapter, which shall be conducted no less frequently than once every three years;

(14) provides (A) specific goals (which shall be established by State law on or before October 1, 1982) for each fiscal year (commencing with the fiscal year which begins on October 1, 1983) as to the maximum number of children (in absolute numbers or as a percentage of all children in foster care with respect to whom assistance under the plan is provided during such year) who, at any time during such year, will remain in foster care after having been in such care for a period in excess of twenty-four months, and (B) a description of the steps which will be taken by the State to achieve such goals;

(15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home;

(16) provides for the development of a case plan (as defined in section 675(1) of this title) for each child receiving foster care maintenance payments under the State plan and provides for a case review system which meet the requirement described in section 675(5)(B) of this title with respect to each such child; and

(17) provides that, where appropriate, all steps will be taken, including cooperative efforts with the State agencies administering the plans approved under parts A and D, to secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance payments under this part.

2. 42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARTIST M., et al.,	)	
	)	
Plaintiffs,	)	88 C 10503
	)	
v.	)	
	)	Judge Shadur
GORDON JOHNSON, et al.,	)	
	)	
Defendants.	)	

On June 21, 1990 the Court of Appeals entered an order partially remanding this case to this Court for the entry of factual findings as to the current delays in caseworker assignment and reassignment (the "June 21 Order"). This Court promptly set a status hearing to schedule the proceedings necessary for that purpose. Because of certain questions identified by this Court in that status hearing, defendants (for convenience hereafter referred to collectively as "DCFS") returned to the Court of Appeals, and the June 21 Order was modified on June 27, 1990 by the "June 27 Order."[1] This Court then set for July 18 both (a) an evidentiary hearing and (b) the contemporaneous advance submission by the parties of proposed findings of fact and conclusions of law--that was the earliest date that the parties could do so, given the preparation that they required for those purposes.

In part this Court directed the parties to include in their evidentiary submissions the information that would facilitate

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[1] Copies of the June 21 Order and June 27 Order are attached as Exhibits 1 and 2 to this memorandum opinion.

this Court's recapitulation of the situation as of the March 2, 1990 date of entry of the preliminary injunction order now on appeal, and that would do so in the context of the record that had been before this Court reflecting the earlier situation at DCFS.[2] That would effectively enable this Court to provide the Court of Appeals with a brief motion picture rather than simply a still photograph, inasmuch as DCFS' perceived lack of progress under its own Reorganization Plan despite the passage of many months was the key motivating factor in this Court's decision to enter the March 2 injunction order.

Shortly before the scheduled July 18 hearing date the parties advised this Court that they had been able to reach stipulations as to a number of the facts that would obviate the need for a testimonial hearing, so that they would meet the July 18 date established by this Court with paper submissions rather than testimony. Both did so at the end of the July 18 working day.[3]

On July 20 DCFS moved to strike virtually all of plaintiffs' submission, setting that motion for hearing on July 24.[4] To the

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[2] That requested presentation was viewed as helpful in directing this Court's attention to the specific record references to the before-and-after situations.

[3] Their Stipulations (cited here as "Stip. ¶--") are attached as Exhibit 3 to this memorandum opinion.

[4] That four-day gap (weekend included) conformed to this District Court's General Rule 12(e), which specifies two working days' prior notice by personal delivery of any motions to be presented in court. However, this Court frequently deals with

extent that DCFS' motion related to the proposed findings of fact ("Findings") tendered by plaintiffs, that criticism was indeed ironic: It essentially sought to object because plaintiffs' submission did deal, in an effective and informative way, with the background that was known to this Court when it rejected DCFS' purported implementation of its Reorganization Plan as having failed to deliver the results that it was supposed to accomplish, and thus as a failure to comply with the statutory "reasonable efforts" standard. And although DCFS' motion proposed to criticize plaintiffs as thus seeking to buttress their case before the Court of Appeals, in a number of vital areas DCFS' own Proposed Findings of Fact did exactly what DCFS' counsel were urging was improper on plaintiffs' part--for DCFS' submission also sought to argue its own case as a matter of advocacy.[1]

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matters on a more expedited basis where there is an emergency or where timing is otherwise critical, and where the opponent does not urge any prejudice by reason of the accelerated schedule. It would seem that type of accelerated treatment should have been sought here, given the Court of Appeals' specified July 26 deadline.

[1] For example, DCFS Proposed Finding 3 unconvincingly sought to reduce the stipulated 19-day average delay in cases transferred from Interim Services Teams ("ISTs") to DCFS area offices at the end of the 30 to 45-day period of initial services provided by the IST (Stip. ¶¶19, 3). DCFS would have this Court find that the 19-day delay somehow becomes a 5-day delay merely because the transferor IST technically (that is, on paper) retains responsibility for a case for 14 days after the file is transferred. From the prior hearings conducted by this Court and from other evidentiary submissions, such theoretical wholly-on-paper responsibilities do not at all serve the goal of actual caseworker assignments to people who are physically able to perform the various caseworker responsibilities. This Court has

Accordingly DCFS' motion to strike much of plaintiffs' submission has been denied. This Court does agrees that no Conclusions of Law of the type suggested by plaintiffs are called for--those were expressly included in this Court's preliminary injunction order--and so plaintiffs' recommended legal conclusions have not been taken into account here.

One last point should be addressed before turning to the Findings themselves. This Court has of course not gone forward with any proceedings in this action during the pendency before the Court of Appeals of the interlocutory appeal from the March 2 preliminary injunction--but that does not relieve this Court of its responsibility to be alert to developments potentially affecting the case. Thus this Court had also been fully aware of, and had been monitoring, the pendency of Wilder v. Virginia Hospital Association, 110 S.Ct. 2510, 2517-23 (1990).[4] It accordingly reviewed the Wilder decision as soon as it was handed down.

If this Court had viewed that decision as in any respect destroying the underpinnings of this Court's determination of plaintiffs' reasonable likelihood of success on the merits in

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therefore rejected DCFS' position as at war with the facts.

[4] That awareness of Wilder was not primarily stimulated by this case. As it happened, this Court had late last year, based on the Supreme Court's having accepted review in Wilder, deferred ruling on a motion in an entirely different case on its calendar--one that posed the identical substantive question of an enforceable private cause of action under the specific statute involved in Wilder (the Boren Amendment to the Medicaid Act).

this case--that is, as negating the existence of plaintiffs' private cause of action here--it would have considered that its judicial responsibility called for requesting a remand from the Court of Appeals to enable this Court to vacate the preliminary injunction because of that supervening development of law.[7] Potential mootness would always seem an appropriate consideration under such circumstances.

Accordingly this Court has indeed considered the effect of Wilder on its preliminary injunction decision here. It has determined that the Supreme Court's upholding of the Boren Amendment's "reasonable rates" standard as giving rise to private enforceable rights under Section 1983[8] strongly reinforces,

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[7] Indeed that is essentially what this Court did in United States v. Williams, 877 F.2d 516 (7th Cir. 1989). There this Court had, during the course of the criminal trial, rejected the proposed entrapment defense of codefendant Tedric Beverly ("Beverly") based on the then-established principles consistently announced by our Court of Appeals' decisions. After Beverly had been convicted by the jury and sentenced by this Court and had then taken an appeal, the United States Supreme Court reversed our Court of Appeals in United States v. Mathews, 108 S.Ct. 883 (1988), which involved the same entrapment question. This Court therefore requested the Court of Appeals to remand the case to permit this Court to determine whether adherence to the supervening Supreme Court decision in Mathews would have required it to submit defendant's entrapment defense to the jury (as this Court had refused to do at trial)--see this Court's opinion in United States v. Beverly, 699 F.Supp. 1256, 1258 (N.D. Ill. 1988). Such a limited remand was ordered by the Court of Appeals, this Court made the necessary determination and returned the case to the Court of Appeals, and the conviction was then affirmed at 877 F.2d 516.

[8] In addition to its rejection of the argument that "the obligation imposed by the [Boren] Amendment is too 'vague and amorphous' to be judicially enforceable" (Wilder, 110 S.Ct. at 2522), the Supreme Court characterized as an "objective benchmark" a standard that called on a court to review whether

rather than casting into any doubt, this Court's decision as to the "reasonable efforts" standard under the statute at issue here (and see the opinion to the same effect by this Court's colleague Honorable William Hart in Norman v. Johnson, 1990 U.S. Dist. LEXIS 6181, at 7-12 (N.D. Ill.), issued after this Court's opinion here and before the Supreme Court's decision in Wilder). This Court will therefore not request any further remand to enable it to consider vacating the preliminary injunction order now on appeal.

This opinion now turns to the Findings. As was true during the proceedings that took place before the entry of the March 2 preliminary injunction, this Court has found DCFS' position largely unpersuasive and that presented by plaintiffs largely persuasive. These Findings therefore draw largely on plaintiffs' submissions.

Findings of Fact

Initiation of Juvenile Court Cases

1. As to each member of the plaintiff classes, DCFS has filed or will file a petition for adjudication of wardship ("petition") in the Circuit Court of Cook County, Juvenile Division ("Juvenile Court"), alleging that the child is abused, neglected or dependent. 1-17-89 Tr. 26, 274.

2. DCFS' filing of a petition is based upon an investigation conducted by its Office of Child Protection,

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the State had "ensur[ed] 'reasonable access' to eligible participants" (id. at 2523).

("DCP"), one of whose investigators is assigned to each case. 1-17-89 Tr. 225, 275, 276. Such investigators do not themselves provide or arrange for any services for children or their families. P. Ex. 29: Denton Dep. 9-10.

3. When DCFS files the petition, it requests an award of temporary custody or the entry of a protective order. If it seeks the former, the temporary custody hearing usually occurs on the same day the petition is filed; but if DCFS recommends a protective order, the first court date is usually scheduled at some future date (at varying intervals) after DCFS files the petition. P. Ex. 29: Benson Dep. 19. Even where DCFS may seek temporary custody of the child, the child and the parents have a right to contest that request. Thus some of those cases, as well as those in which DCFS recommends a protective order, result in the Juvenile Court's referring the child to his or her parents' custody under a protective order. 1-17-89 Tr. 27-28. Conversely, when the Juvenile Court awards temporary custody, it appoints Gary T. Morgan or another person as custodian of the child.

Vital Role of the Caseworker*

4. When temporary custody is taken, a DCFS caseworker must be assigned in order to maintain the child's family ties, work toward reunification and ensure the child's well-being. To those ends the caseworker must search for relatives qualified to care for the child or locate a suitable placement; arrange appropriate counseling; complete school transfers where appropriate so the child's education is not interrupted; arrange family visitation; provide appropriate medical care; and generally assure the child's safety. 1-17-89 Tr. 247-58; P. Ex. 29: Mayberry-Dunn Dep. 15-16, Williams Dep. 22-27. In temporary custody cases the caseworker is also responsible for developing a written, individualized case plan and advising the Juvenile Court of the condition of the child and the family. 1-17-89 Tr. 31; 1-19-89 Tr. 786; P. Ex. 29: Mayberry-Dunn Dep. 15-16, Williams Dep. 22-27.

5. If no caseworker is assigned to the case, the child is usually dropped off at a placement without any information about his or her case, such as the nature of the abuse or neglect and the names of family members. Without that critical information,

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* DCFS' proposed Findings seek to denigrate the importance of caseworkers as mere "case managers, who arrange for the provision of services by others." But that is both (1) a mistaken emphasis on the mechanics rather than the human values involved in the relationship and (2) all of a piece with DCFS' consistent substitution of a theoretical paper structure of "responsibility" for the existence of a live person with actual hands-on responsibility for assuring that the needed services are in fact provided (see n.5, Finding 19 & n.10 and Finding 22.

neither reunification services such as visitation nor other vital child welfare services can begin. 1-17-89 Tr. 82; 1-18-89 Tr. 351-56.

6. In protective order cases the caseworker must secure services to preserve the family: individual or family counseling to ease or eliminate the crisis that led to the child's mistreatment; homemaker and housekeeping services so that the conditions of the home will not require the child's removal; substance abuse programs to enable parents to attend to their children's needs; help in obtaining food, shelter and medical care; and monitoring of the child's safety at home. 1-17-89 Tr. 168, 183; P. Ex. 29: Mayberry-Dunn Dep. 15-16.

7. DCFS may also contract with a private agency to provide child welfare services in both protective order and custody cases. Significantly, DCFS' own standards confirm the importance of personal contact by the assigned worker--it requires a private agency to see the child within 24 hours of receipt of the case. Plaintiffs' January 19, 1990 Response to Defendants' Report to the Court ("P. Resp.") Ex. 1, Int. 5(h).

8. When a case is transferred to a private agency, DCFS and the private agency share the responsibility for delivering services, so that the private agency delivers services directly while DCFS has a supervisory and monitoring role. 1-19-89 Tr. 699; P. Ex. 29: Mayberry-Dunn Dep. 39. DCFS caseworkers are jointly responsible with the private agency for preparing a case plan and providing an administrative case review, and they retain

ultimate responsibility for all facets of the case. P. Ex. 29: Williams Dep. 26. DCFS' caseworker also remains responsible for ascertaining whether there are appropriate relatives with whom to place a child. 1-17-89 Tr. 84. Certain services (such as psychiatric hospitalization for a suicidal child) may not be provided by a private agency, and the DCFS caseworker remains primarily responsible for obtaining or providing the consent for such services. 1-18-89 Tr. 359. DCFS' caseworker may also be required to authorize familial visits. 1-18-89 Tr. 363, 365. DCFS' caseworker is also responsible for planning for the long-term care of children in short-term private agency placements, a responsibility that includes authorizing a psychological evaluation, which is essential to the long-term placement of an adolescent. 1-18-89 Tr. 353.

9. Unless and until DCFS has assigned a caseworker, no services can be or are in fact provided to plaintiffs or their families. P. Ex. 29: Mayberry-Dunn Dep. 35, Denton Dep. 29. For example, a young child in DCFS' custody may be denied visits with her parents or siblings for several weeks (1-17-89 Tr. 89; 1-18-89 Tr. 342, 355-56, 363-65); be left in an inappropriate placement such as a shelter, even when appropriate relatives are interested in caring for her (1-17-89 Tr. 84-85); be denied sex abuse treatment, grief counseling or psychiatric care (1-17-89 Tr. 100, 111; 1-18-89 Tr. 359); be unable to attend school (1-18-89 Tr. 341-42); or be in DCFS custody without any case plan (Benson Exs. 1 and 5)--all while awaiting the assignment of a

caseworker.

10. DCFS' failure to provide caseworker-initiated services at early stages of its custody of plaintiffs is particularly harmful. 1-18-89 Tr. 367, 499-500; 1-19-89 Tr. 636; P. Resp. Ex. 2. Because family members are the most motivated during a time of crisis, immediate intervention is essential. 1-18-89 Tr. 389. Relatedly, the likelihood that children whom DCFS separates from their families will return home is directly related to the speed with which they receive reunification services. 1-18-89 Tr. 500; P. Resp. Ex. 3. Thus the greater the delay in providing such services during this critical period, the more likely it is that the child will never return home, and the goal of family reunification becomes more remote and less attainable. 1-17-89 Tr. 227; 1-18-89 Tr. 365, 367; 1-19-89 Tr. 629.

11. Children who reside at home under DCFS' supervision are also denied family preservation services and protection when no caseworker is assigned. 1-17-89 Tr. 183. For example, without a caseworker a child who had come under DCFS' supervision because her parent failed to provide adequate food went hungry again and had to leave her mother's home (1-17-89 Tr. 129-31); a parent who had been ordered to obtain drug treatment by the Juvenile Court and was willing to do so in order for her children to remain with her had no assistance from a caseworker in locating and enrolling in a drug treatment program (1-18-89 Tr. 402-06); and a child who was without an assigned caseworker to make home visits was further abused by his father and had to be removed from his

father's custody (1-17-89 Tr. 131-38).

12. When children remain at home, DCFS' failure to provide family preservation services quickly places them at risk and often results in their removal from home. 1-17-89 Tr. 129-37; 1-18-89 Tr. 512; 1-19-89 Tr. 629; P. Ex. 29: Johnson Dep. 29-30. Defendant Gordon Johnson testified (1-19-89 Tr. 630):

> [W]e didn't have a strong preventive effort at the front end of the system to try to keep children, as much as possible, at home with all the possibility of good services.

Without such an effort, the child's situation often deteriorates and DCFS must remove the child from her home. 1-17-89 Tr. 133-38; 1-18-89 Tr. 447, 512.

DCFS' Caseworker Assignment Practices at the Time of the Hearing

13. As of December 31, 1988 DCFS regularly delayed the assignment of cases to caseworkers capable of initiating child welfare services to the plaintiffs and their families, both in protective order and in temporary custody cases. In most cases DCFS did not assign a caseworker until at least two weeks after the first Juvenile Court date. In a large number of cases the delays lasted 30-45 days after plaintiffs' cases were initiated in Juvenile Court, with some delays in excess of 45 days. Stip. ¶1.

14. Delays described in Finding 13 occurred in cases sent from DCP to one of the ISTs. ISTs handled new temporary custody cases except sex-abuse cases. Other court cases--protective order and sex-abuse cases--were sent from DCP directly to one of

DCFS' area offices. There were similar 30-45 day delays in those cases. Stip ¶2.

15. In a large number of cases, even after caseworkers were assigned children lost the benefit of the assignment when their cases later became unassigned. That happened at various stages in a variety of ways. In cases initially sent to an IST, the caseworkers were assigned for only 30 to 45 days. Stip. ¶3. After the IST completed its tasks, each of its cases would be transferred to one of DCFS' four area offices. Id. There children were again often left for significant periods of time without a caseworker, and thus without family reunification and other child welfare services. 1-17-89 Tr. 33, 188; 1-19-89 Tr. 605-06, 680-81.

16. Similar gaps occurred when DCFS failed to reassign cases after caseworkers in DCFS' four area offices resigned, were terminated, transferred or took leaves of absence. 1-17-89 Tr. 32-33; 1-19-89 Tr. 685-89, 745; P. Exs. 23-25. Those gaps arose regularly as well, for DCFS caseworkers frequently transfer, take leaves of absence, are terminated or resign. Stip. ¶4. Children whose cases were previously assigned to those caseworkers generally went without a caseworker for 30 days after those absences began. Stip. ¶6. Moreover, some children's cases remained assigned to workers who had left DCFS months earlier. P. Ex. 23, 25.

17. Unassigned cases generally were a significant problem as of January 1989. At the end of September 1988 DCFS records

reflected that there were over 200 cases in Cook County that had been unassigned for over 30 days. P. Group Ex. 28-0 at 2. At the end of November 1988 DCFS records showed that 320 cases in Cook County had been unassigned for over 30 days, that 83% of those had been unassigned for over 60 days and that 63 cases had been assigned for over 100 days. P. Group Ex. 28-R; P. Ex. 26. In November 1988 Mark Moses, the DCFS employee responsible for monitoring the unassigned caseworker problem, actually wrote, "[T]here are good reasons to have those cases unassigned." Plaintiffs' Group Ex. 28-O. On December 13, 1988 the head of DCFS' Cook County operations wrote that unassigned cases in Cook County were on the rise. P. Group Ex. 28-P.

18. DCFS did nothing to expedite the assignment of caseworkers capable of delivering family preservation, family reunification and other services to children and their families. Delays described in the prior Findings were a direct result of DCFS' failure to require its personnel to assign cases promptly. P. Ex. 29: Benson Dep. 30-31. DCFS had no mechanism that systemically assured prompt caseworker assignment. 1-17-89 Tr. 241-42. For example, DCFS did not limit the time within which a supervisor must assign a case. P. Ex. 29: Benson Dep. 30-31.

19. DCFS also failed to develop a policy or procedure for reassigning cases of caseworkers who are absent, irrespective of the reason, for substantial periods of time. 1-19-89 Tr. 685-89, 745; P. Group Ex. 28-H, J, N, O, R. In fact DCFS' witnesses testified that there was a "management decision" not to reassign

cases of workers on leave and that DCFS had no procedure whatever regarding cases of workers on leave for a period up to five weeks. 1-19-89 Tr. 745; and see Stip. ¶¶ 5, 6. Often DCFS made paper assignments by assigning a caseworker in name only. 1-17-89 Tr. 190. Such paper assignments left the child without services, for in reality the child lacked a caseworker.[10] 1-19-89 Tr. 688; 1-17-89 Tr. 110-11; Benson Ex. 5.

DCFS' Caseworker Assignment Practices: 1989-90

20. By July 1989 DCFS had implemented three of the four elements of its plan to remedy the caseworker assignment process:

(a) the Early Response Package, reducing the paperwork necessary to transfer a case from DCP investigators to the IST and follow-up caseworker teams (1-19-89 Tr. 606);

(b) the expansion of the IST program, designed to allow DCFS to assign all new custody cases to an IST before transferring them to an area office; and

(c) the Family First Initiative ("Family First"), designed to provide intensive services to children remaining at home with their parents.

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[10] At the risk of belaboring the point, this past pattern of behavior on DCFS' part ties directly into the lack of credibility of DCFS' argument referred to in n.5. It also reinforces the appropriateness of this Court's looking at DCFS' past performance (or more accurately its lack of performance) when this Court evaluated the situation at the time it entered the March 2 preliminary injunction order.

D. Supp. Submission (August 4, 1989) at 29-32; Stip. ¶¶ 8, 9, 11 and 12. On July 16, 1989 the final element of DCFS' plans, the division of DCP into the same geographic areas as the area offices, was completed. Stip. ¶4.

21. Despite the changes, significant delays persisted in assigning caseworkers at the outset of cases. For children whose cases were initiated in Juvenile Court in July 1989, DCFS took an average of 9.3 days between the initial court appearance and the assignment of an IST caseworker and 19.1 days between the transfer from the IST to the assignment of a follow-up caseworker. P. Resp. at 3.

22. IST caseworkers retain full responsibility for a case for 30 to 45 days. Stip. ¶3. After that initial period DCFS can extend the assignment of an IST caseworker for an additional two weeks, but during the extension the caseworker's role is limited to court appearances and to arranging placement changes. P. Resp. Ex. 1, Int. 3(k). IST does not retain responsibility for the remaining caseworker functions such as monitoring a child's safety or arranging parent-child visits.[11] Moreover, the practice of extending IST responsibility is not always followed. P. Supp. Submission (February 12, 1990) at 12 n.9.

23. As a result of DCFS' policies and practices, children whose cases were initially served by an IST were without a caseworker capable of delivering the full array of reunification and other child welfare services for an average of one month

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[11] See n.5.

within the first two to three months. P. Resp. at 3. Those caseworker gaps occurred at a time crucial to the reunification of plaintiffs with their families. Id. Exs. 2, 3.

24. Neither the IST nor the Family First program functioned as planned. In July 1989 approximately one-third of new custody cases went directly from DCP to area offices without IST intervention. P. Resp. at 6. In those cases DCFS failed to assign a caseworker until, on average, 10 days after the first Juvenile Court date. Id. at 6-7. As for Family First, children whose cases were initially assigned to that program experienced significant delays after the expiration of the two to three months during which Family First served the family before assignment of a caseworker at the area offices. 1-19-89 Tr. 602; P. Resp. Ex. 9.

25. DCFS' claims that 77% of July 1989 cases were assigned from DCP to IST in under 5 days were based on a log that IST maintained for new cases. P. Resp. Ex. 1, Int. 2(b). But that log did not include the date on which cases were really assigned at IST. Id. Ex. 4, Benson Dep. 28-29; Stip. ¶17. Instead the information contained in the log and the basis for DCFS' representations was merely the date that the early response package "was received at IST." Defendants' January 31, 1990 Reply to Plaintiffs' Response to Defendants' Reports to the Court ("D. Reply") at 14. DCFS had no record of when the cases were actually assigned to an IST caseworker capable of providing child welfare services to plaintiffs and their families. P. Resp. Ex.

4, Benson Dep. 17-18, 28-29.

26. DCFS' changes did not address the gaps created when caseworkers resigned, transferred, were fired or took a leave of absence. Stip. ¶25. Given the number of and frequency of transfers and the high turnover rate of DCFS caseworkers, DCFS' failure to attempt to deal with that problem was especially dangerous. Goad Ex. 9 at 1, 3; P. Group Ex. 28-O at 1; P. Ex. 29: Denton Dep. 22. If a caseworker were absent for less than 30 days, the supervisor merely monitored the case without handling the everyday service needs of the family. D. Supp. Submission (August 4, 1989) at 36. When absences extended beyond 30 days, DCFS' policy and practice continued to permit supervisors to leave cases previously assigned to the absent caseworker unassigned for 30 or more days. Stip. ¶¶ 4-6, 25.

27. Cases that were reassigned during a caseworker's absence were reassigned en masse to a single caseworker, who by the nature and volume of the reassignments was not and could not be expected to provide services. P. Resp. Exs. 10, 11.

28. Even after implementation of DCFS' plans, its procedures failed to fix responsibility for assigning a caseworker promptly. DCFS assigned Mark Moses to monitor unassigned cases but did not require him to take action when he observed the existence of unassigned cases. P. Resp. Ex. 6, Moses Dep. Gloria Lewis, DCFS' Associate Deputy Director for Cook County Operations who supervises the administrators of the four area offices, received monthly reports listing unassigned

cases. P. Resp. Ex. 7, Lewis Dep. Nonetheless, she played no role and had no responsibility in ensuring the assignment of those cases. Id. at 15, 47-49.

29. John Goad and Chris Benson, to whom DCFS entrusted the responsibility of closely monitoring compliance with the Early Response Package, reviewed DCFS' performance on only two occasions in all of 1989. John Goad Affidavit (January 31, 1990) ("Goad Aff.") at 3-4, attached to Defendants' Reply of the same date. DCFS instead simply relied on its expectations (really its wishful thinking) that cases would be assigned. Defendants' Reply at 4, 14.

30. DCFS finally revised the IST logs in December 1989 to record the date on which a caseworker was actually assigned. Affidavit of Chris Benson (January 31, 1990) ("Benson Aff.") at 9, attached to Defendants' Reply; Stip. ¶18. DCFS then submitted December logs for one IST team to this Court. Benson Aff. Ex. F. Of the 20 cases that DCFS selected for the Court's review, only 9 were assigned in 5 days or less. Id. All the remaining cases were assigned only after significant delays, with several of them assigned 10 days or more after the first Juvenile Court date. Id.

31. On December 7, 1989 Goad wrote in an internal memorandum that the percentage of cases not routed to IST within 5 days had <u>increased</u> since July 1989, a trend he described as "disappoint[ing]." Goad Aff. Ex. B.

32. IST logs from January and February 1990 also

demonstrated continuing delays in IST caseworker assignment. In January and February 1990 DCFS sent approximately 150 cases to IST for assignment of a caseworker. Stip. ¶21. In several cases IST logs did not contain adequate information to determine the date on which a caseworker was assigned. Id.

33. DCFS did not assign a caseworker within 5 days of the first Juvenile Court date in 56 of the remaining 146 cases sent to IST in January and February 1990. Id. DCFS thereby fell significantly short of the goal that it had established for itself: assignment of a caseworker within three to five days. 1-17-89 Tr. 227, 149; Defendants' Proposed Findings of Facts and Conclusions of Law (January 30, 1989) at 44; Defendants' Supplemental Reply Regarding Defendants' Reports to the Court and in Opposition to Plaintiffs' Motion for Preliminary Injunction (February 12, 1990) at 3.

34. In February 1990 alone DCFS did not assign a caseworker within 5 days of the first court date in 40% of the cases sent to IST (33 of 82) and within 10 days of the first court date in 22% of those cases (20 of 82). Of the February 1990 IST cases, 12% (11 of 82) were left unassigned for more than three weeks. Excluding cases that had been screened in advance, DCFS failed to assign a caseworker within 5 days of the first court date in 60% of the February cases.[11]

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[11] By agreement of the parties in open court on July 24, DCFS' February 1990 logs have been made Exhibit A to the Stipulations and are accordingly attached as part of Exhibit 3 to this opinion.

35. DCFS also continued to leave cases unassigned, on the average, for nearly three weeks after IST completed its tasks. Stip. ¶24. DCFS also failed to modify its policy or its practices against the reassignment of case in the area offices. Stip. ¶25. As a result, DCFS left cases previously assigned to absent caseworkers unassigned for an average of 30 days. Id.

36. System-wide caseworker assignment problems grew as well. Thus the total number of unassigned cases grew from 232 on June 30, 1989 to 404 by the end of 1989, parallelling the pattern of the previous year. P. Resp. Ex. 13. And the number of cases unassigned for over 30 days doubled over the same period of time. Id.

37. For an extended time period of many months during the pendency of this case, this Court had left DCFS wholly unconstrained by any order setting time requirements for caseworker assignments, because it had taken DCFS at its word that its adoption and implementation of the Reorganization Plan represented the "reasonable efforts" required by the statute. It was only after DCFS' performance had failed so substantially, with no adequate explanation offered by DCFS for that failure and with DCFS' unfulfilled generalized predictions having demonstrated a total lack of credibility, that the preliminary injunction order now on appeal was entered as required to satisfy DCFS' statutory "reasonable efforts" obligation. In doing so this Court (a) rejected plaintiffs' request for an order requiring such assignments to be made within 24 hours as an

unrealistic requirement, (b) accepted DCFS' representations that a three-working-day requirement was capable of accomplishment (although DCFS did object to the entry of any such order) and (c) deferred the effective date of the preliminary injunction order by approximately 90 days, thus accepting DCFS' position as to the amount of additional time that it would need for that purpose.

Milton I. Shadur
United States District Judge

Date: July 25, 1990

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 21, 1990

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

ARTIST M., et al. Plaintiffs-Appellees, Nos. 90-1742 and 90-1764 v. GORDON JOHNSON, et al. Defendants-Appellants.	] Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.] No. 88 C 10503]] Milton I. Shadur, Judge.

ORDER

The preliminary injunction entered by the district court requires that the Department of Children and Family Services (DCFS) assign a caseworker within three working days from the time plaintiffs' cases are first heard in juvenile court as well as within three working days from the time a previously assigned caseworker relinquishes any portion of a case. DCFS voluntarily instituted a Reorganization Plan which has as its goal the reduction of delays in caseworker assignment to three to five days in most cases. It is unclear from oral argument before us and from the record what amount of delay currently exists between (1) a hearing in juvenile court and the assignment of DCFS caseworkers to that case, and (2) reassignment of a case to a new caseworker following the relinquishment of any portion of a case by the previously assigned caseworker. The record is also unclear on how far away DCFS is from attaining the goals outlined in that Plan. Accordingly, this appeal is remanded for the limited purpose of permitting the district court to hold an evidentiary hearing, if deemed necessary, and to enter written findings with respect to the extent of the present delay in caseworker assignment and reassignment and the extent to which DCFS has met its goals under the Plan. The district court should also inform us if a preliminary injunction is still necessary. We request that the findings be made as soon as possible, but no later than July 26, 1990.

The defendants' motion to strike pages 463 to 475 of the Appendix to the plaintiffs' brief is denied.

United States Court of Appeals

JM

For the Seventh Circuit
Chicago, Illinois 60604

June 27, 1990

CORRECTED

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

ARTIST M., et al. Plaintiffs-Appellees, Nos. 90-1742 and 90-1764 v GORDON JOHNSON, et al. Defendants-Appellants	]Appeals from the United]States District Court]for the Northern]District of Illinois,]Eastern Division.]No. 88 C 10503]]Milton I. Shadur, Judge.

O R D E R

Our order of June 21, 1990 remanded this appeal to the district court for entry of factual findings with respect to the current amount of delay in caseworker assignment and reassignment. We now modify that order and direct the district court to enter written findings on the following factual issues as they existed at the time the injunction issued: (1) the amount of delay between a hearing in juvenile court and the assignment of DCFS caseworkers to that case, (2) the amount of delay between the time a caseworker relinquishes any portion of a case and the time a new caseworker is assigned, and (3) the extent to which DCFS has met its numerical goals, as set forth in our June 21, 1990 order, under the Reorganization Plan. We request, as before, that these findings be made as soon as possible, but no later than July 26, 1990.

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RECEIVED
JUL 18 1990
MILTON L SHADUR CLERK
UNITED STATES DISTRICT COURT

ARTIST M., et al.,

Plaintiffs,

v.

GORDON JOHNSON, et al.,

Defendants.

No. 88 C 10503
Hon. Milton I. Shadur

STIPULATIONS

Plaintiffs Artist M., et al., by their attorneys, and defendants Gordon Johnson and Gary T. Morgan, by their attorneys, hereby jointly stipulate to the following facts.

Conditions as of December 1988

1. As of December 31, 1988, the Department of Children and Family Services ("DCFS" or the "Department") regularly delayed the assignment of cases to caseworkers capable of initiating child welfare services to the plaintiffs and their families. In most cases, DCFS did not assign a caseworker until at least two weeks after the first Juvenile Court date. In a large number of cases the delays lasted 30-45 days after plaintiffs' cases were initiated in Cook County Juvenile Court, with some delays in excess of 45 days.

2. These delays occurred in cases sent from DCFS's Office of Child Protection ("DCP"), the Department's investigative arm, to one of its Interim Services Teams ("IST"). IST handled new temporary custody cases except sex-abuse cases. Other court cases, namely protective order and sex abuse cases, were sent from DCP directly to one of DCFS' area offices. There were similar 30-45 day delays in those cases.

3. In IST cases, the IST caseworker retained responsibility for the case for 30-45 days. After IST caseworkers completed their tasks, the IST supervisor called the Service Coordination Unit ("SCU"), which then assigned the case to a caseworker team at the appropriate area office. IST then sent the case file to the supervisor of the team through DCFS's messenger service, which operated three times per week. The supervisor of the team then would assign the case to a caseworker.

Reassignment of Cases

4. Follow-up caseworkers in the four area offices frequently transfer within the Department, take leaves of absence, are terminated, or resign from their positions in DCFS's area offices. (The following

discussion will refer to these caseworkers in the aggregate as "absent caseworkers.")

5. As of December 31, 1988, DCFS policy allowed team supervisors 30 days in which to make decisions regarding the reassignment of the absent caseworkers' cases.

6. DCFS's management policy and practice permitted supervisors significant latitude and discretion in decisions regarding reassignment of cases. The cases of absent caseworkers generally were not reassigned for 30 or more days after their absences began.

Changes in DCFS's Caseworker Assignment System

7. In 1988, DCFS administrators became aware of delays in caseworker assignment. As part of their efforts to remedy those delays, on January 1, 1989, the Division of Cook County Operations ("DCCO") initiated use of an Early Response Package for cases transferred from DCP to IST.

8. The Early Response Package contains those investigation materials necessary to obtain a Juvenile Court order, enabling cases to be transferred out of DCP prior to completion of the entire investigation.

9. In February 1989, DCFS began sending certain protective order cases to private agencies under the Family First program, for provision of intensive home-based services by the private agencies.

10. By August 31, 1989, Family First had provided services to 169 families in Cook County under Juvenile Court protective orders.

11. Between January and May 1989, the Department added two new IST teams, bringing the total to four units, with the goal of eventually assigning all court cases to IST.

12. On May 22, 1989, DCP began transferring all new temporary custody cases involving sex abuse to IST.

13. DCFS's Cook County region contains four area offices, covering distinct geographic areas. On June 1, 1989, the four IST teams were geographically aligned with the four Cook County area offices.

14. On July 16, 1989, the DCP teams were geographically aligned with the four area offices.

15. In September 1989, the Department initiated a Home of Relative Initiative, which called for most cases involving children placed in foster care with relatives to be transferred to private agencies for case

management and services, with a goal of reducing caseloads across the entire DCFS system.

16. On November 13, 1989, DCP began transferring protective order cases to IST. New court cases (other than previously opened cases, Home of Relative cases, or Family First cases) went from DCP to IST as of that date.

17. During 1989, the DCP and IST administrators monitored initial assignment of caseworkers at IST through, among other means, use of logs which reflected receipt of the case at IST.

18. In December 1989, the IST logs were modified to reflect actual assignment of an IST caseworker.

Conditions as of 1989 and Early 1990

19. Cases transferred from DCP directly to area offices during 1989 experienced delays similar to those in December 1988. Cases transferred from IST to area offices during 1989 experienced average delays of 19 days.

20. In January and February 1990, DCFS sent approximately 165 cases to IST for assignment of a caseworker. In some cases IST logs did not contain

adequate information to determine the date on which a caseworker was assigned.

21. DCFS assigned a caseworker within five calendar days of the first court date in 90 (61 percent) of the remaining 146 cases sent to IST in January and February 1990. The Department failed to assign a caseworker within five calendar days in the remaining 56 cases (39 percent).

22. In January and February 1990, DCFS did not assign a caseworker within 10 calendar days of the first court date in 25 cases sent to IST, or 17 percent.

23. In January and February 1990, DCFS did not assign a caseworker within three weeks of the first court date in 14 cases sent to IST, or 10 percent.

24. As of March 2, 1990, cases transferred from IST to area offices were unassigned for an average of 19 days.

25. Defendants did not change DCFS's policy regarding the reassignment of cases previously assigned to absent caseworkers between December 31, 1988, and March 2, 1990. DCFS's practice as of March 2, 1990, left cases previously assigned to absent caseworkers unassigned, on average, for 30 days.

Dated: Chicago, Illinois
July 18, 1990

Respectfully submitted,

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Michael G. Dsida
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Julie L. Biehl
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Attorneys for Defendants

C = Cocaine Identified Problem

A 011025

FAMILY NAME	C	ADDRESS	CHILDREN/WHEREABOUTS	First Contact	IST/WHK/L	SCR I.D.	EARLY RESP CASE REC.	TC/SUP DATE	NEXT CT DATE	XFER DATE/TO
Menchaca Rocha Maria		2349 So Kolman 762-4680	Dralia Menchaca (3) Lucia Menchaca (4) UNP	2/7/90	2BO2	3021820	2/2/90	F.D. 2/16/90		
Collins Cheryl		1530 Harlem #2E Riverforest 366-9497	Mason Kendall 11/5/78	2/1/90	2B48	3684600	2/2/90	F.D. 2/23/90		
Estrada Sandra		3426 W. 22nd Cicero	Estrada Francisco 2/21/87	2/26/90	2B'CT	3102763	2/6/90	TR 1-31-90		
Dawson Veronica		5315 W. Potomak Chgo. 626-5473	DAWSON GIOVONE 9-30-86		2BO2	3710834	2/5/90		3/21	
Gray Brenda	C	3540 W. Congress Pkwy 638-1162	Mearps Brittny 11/20/88	2/6/90	2B44	3708134	2/5/90	FD 2/21/90		
Pendleton Elaine		3137 W. Lexington Chgo.	Pendelton Claude 11/13/87	2/13/90	3718674	3718674	2-7-90			
Buford Verlale		3566 W. Congress Chgo	Buford Shalee 4/23/89			3509000				
Buford Verlale		5566 W. Congress Chgo.	Buford Shalee ESC	11/89		3736744	2-7-90			
Campbell Brenda	C	7845 S. May Chgo. 733-1693	Campbell, Patrick	2/26/90	2B52	3710954	2-8-90	F.D 2/13/90		
Dennis Lita	C	8 So Waller and Chgo. IL	Dennis (Request) NWP	1/91	2B44	3710674	2-19-90	FD 2/21/90		

Exhibit A

INTERIM SERVICE TEAM - CASE LOG TEAM 2006 29 AREA

C = Cocaine Identified Problem

A 011026

FAMILY NAME	C	ADDRESS	CHILDREN/WHEREABOUTS	First Contact	DCP-TM1 IST/MTK/DT	SCR # I.D.#	EARLY DISP CASE REC.	W/SAR DATE	NEXT CT DATE	XFER DATE/TO
Schroeder Gloria		303 Des Plaines Ave Forest Park		2/13/90	2848	186270	2/14/90			WAO
Littleton Rwanda		11432 So Indiana Chgo. Also 9231 Cottage Grove IL	Littleton, Jimmy 4-1-85 11432 So Indiana	2/14/90 K	Wolfenbarger 2842	V8978300 3711A8A	2/13/90	FW 2-1-90		2BC
			Littleton, Jaime 4-4-85 (313) 747-8930		Wolfenbarger 2842	T32X600 04	2/13/90	CT 3-16-90		3/
Jude LaDoe	C	1213 So Harding Chgo.	Powell, Michael c/o Rebecca RYAN 1220 W James Chgo. #312 465-7943		Wesson 2848	247206 T33X200	2/13/90	FW 1-16-90 CT 3-12-90		WAO 2BCX3
			Burley, Antwan 8-14-87							
			Hope, Donald 11-14-87							
NUNNERY, BEVERLY		713 N. LATROBE CHGO. ILL.	FAULKNER, JENNINGS c/o NUNNERY, PEARL 713 N LATROBE CHGO ILL. 65462		2841 Fisher	273420 R3-10-8200	2/14/90	FW 11/6/90		WAO 2BCX3
			NUNNERY, CHAUNCEY c/o NUNNERY, PEARL 713 N LATROBE CHGO ILL. 65462							
			NUNNERY, SHANA c/o NUNNERY, PEARL 713 N LATROBE 5th. Floor 65462							
PEREZ, MARIA		2705 W 24th St. Apt C CHICAGO, ILL. 247-0295	PEREZ, GRACIELA RUBIO, CRYSTAL 2705 W 24th St	2/22/90	JOHN RYAN Fisher 2/14/90	228104A T33X-30 00	2/14/90	FW 2/6/90 CT 3/12/90		2BC 3/

INTERIM SERVICE TEAM - CASE LOG TEAM 20 AREA

A 011027

C = Cocaine Identified Problem

FAMILY NAME	C	ADDRESS	CHILDREN/WHEREABOUTS	First Contact	DCP-TMI 1ST/MUK/DT	SCR # I.D.#	EARLY DISP CASE DEC.	TC/SAN DATE	NEXT CT DATE	XFER DATE/TO
CASTILLO STELLA		2734 S. DRAKE CHICAGO, ILL	HERNANDEZ NANCY 12/19/88 HERNANDEZ, ANTONIO 9/10/89 2734 S DRAKE	2/29/90	2814	361065	2/14/90	P.O 12/28/90		3804 (P 2/21 P.C Transferred
ANONO, JOANN		4316 W CORTEZ CHICAGO	ANONO, SHERRY 7/16/76 4316 W CORTEZ		2617	322341A		P.O. 2/5/90		
PHILLIPS, TINA		1032 N. HAMLIN CHICAGO, ILL.	PHILLIPS, JAMES % TINA PHILLIPS (mom) 1032 N. HAMLIN 772-6666	1/SE FH: 2/90 PO: 2/87		1302 W.N	2/14/90			
Adames, Roslyn	C	2006 So 17th Maywood, ILL.	Classie Reed 2006 So 17th Maywood (708) 450-4466		2618	289616		P.O 11/28/90		3003 01 Transferred 5/11/91
Donley Corine	C	4903 W. Van Buren 2nd. 26-2857	Donely Natinie		2848	312763A	2/14/90			2B?
Hopkins Jewley		5950 W Warren 626-2043	Hopkins Barnell 11/9/73 Chip Reed		2818	363462A	2/20/90	F.U. 1-4-90		3P TRA
White Ursula Arthur		568 N. Laramie 2 FL.	White Faith 0 HMK • Richard(s) • Arvine(s)	HSE	2873	313358 A	2/20/90	P.O. 2-15-90		2B? 4H
Moore Shaun	C	(Work Release) 3597630 (MGM MIRAGE HOUSE) 2844 W Washington	SHANE TRACEE 13 " JACKSON 11 " ERIC 6 " JOHNS 7	2/22/90 K+110	2618	2654120	2/21/90	P.O. 2-15-90		
Chapman Shelia		1429 N Hatrobe	ELAINE 11-8-77 Dajmone Julius 11-8-75 Simon 12-13-84	Roseburg	2814	1348900 1346-3 m	2/22/90 "			
Umar, Amir Kullenkamp, Linda	C	1339 W 47th St	Umar, Anthony 5 Angela 2 Amanda 3 HMK 523 2612 Ormine Umar	Roseburg	2814	345162 D	2/26/90	P.O. 3-12-90		

Schaub Laura	7407 Elmwood Park	Wpw Grp 3 (8) (2)	Contact Reading	1st/wrk/DT Softsmith 3/1/90	322344A	2/26/90	F.D. 3-6-90		2804 11
Campbell Kimberly	6124 J. King Dr #15	" HWP Smith Darrell 2/1/88	Reading	2nd/wrk/DT Smith 2/26/90	373556A	2/25/90	F.D. 3-19-90		
Steele Mary	6543 So St Lawrence Chgo. Apt 608 Stlawrence 667-6210	" Jackson Travis 11-26-77 3 times " Travis " Willie	Reading	3875 Smith 2/26/90	374368A F398100	2/28/90 (H574900)	FD 3-22-90	Closed 4/18/90	

INTERV SERVICE TEAM - CASE LOG TEAM 2P 2 AREA

C - Cocaine Identified Problem

A 01

	FAMILY NAME	C	ADDRESS	CHILDREN/WHEREABOUTS	First Contact	DCP-THI IST/MRK/DT	SCR # I.D.#	EARLY RESP CASE REC.	TC/SUP DATE	NEXT CT DATE	XFER DATE/TY
(1)	(LINK EARLY RESPONSE) HORTON, MATILDA (OLDER MATTIE)		1844 LELAND EVANSTON #2W	HORTON, ARCADIAN (6M) (9-27-91) (ADD REL NEEDS TO BE A PARTY) 328-5786	3/1	2540 LELAND PJ 3/5/90		2/1/90			
(2)	(UNCOMPLETE E.R.) DUARTE, ADELINA		3809 W MONTROSE #3W CHICAGO 60618	CARRILLO, CYNTHIA (RM) (9-26-90) UNKNOWN	2/16	2605 W ADAMS GH 3/5/90	3407834	2/5/90			
(3)	[illegible]		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	
	[illegible]		UNKNOWN (NO) [illegible]	[illegible]		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	
(3)	AS 60, 04 STEWART, LINDA		540 Algonquin Rd Evanston, IL 60120 708-742-5030	Stewart, Jerrel (child) - Cameron (child) - Serena (child) - Jessica (child) - Teresa (child) - Terrence (child) Marcus, Zibari (child)	2/14	2640 OS 2/8	2340056	2/14/90			
(4)	2ND PARTNER - REL'D DT 4A DEADFORD, HERBERT		1053 S Bissell 960-9117	Deadford, Jerrell (child)	2/14	2633 Warren 2/9	3223174	2/14/90			
(5)	[illegible]		630 W Evergreen #1001	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	

INTERIM SERVICE TEAM - CASE LOG TEAM 2B _____ AREA

February 1991

C = Cocaine Identified Problem

A 01

	FAMILY NAME	C	ADDRESS	CHILDREN/WHEREABOUTS	First Contact	DCP-THS IST/WRK/DT	SCR # I.D.#	EARLY RESP CASE REC.	TC/SUP DATE	NEXT CT DATE	XFER DATE/T
(6)	SEAVERTS, BARBARA #22		1233 W. MORSE CHGO 60626 761-6548	(LA) SEAVERTS ATLANTIS FHB (1/31/91) Anna Moore 9/91 3 6mos (1 10/31-1990) Chic Comm	No not a new Hou, Alone att. thalpo 2/23 IP	2898 Gallus RL 2/14	37328 7 A	2/6/91			
(7)	WALKER, KATRINA #24		1144 N LARABEE CHGO, IL 60610 Home Visits (Cates)	EVANS, ANTOINE HHF (1/16/87) EVANS, ANTONIO (2/27/91)	2/27	2647 C Parsons PJ 2/14	373351 A	2/6/91			
(8)	RICHER, KAREN #22 7th & STATE ELGIN - 742-1040		HGP'd Taylor Alexander & Bernice 2419 W MONTROSE 878-9645	TAYLOR, ALEXIS (2/20/91)	2/23/90 mom	2849 BARNES GH 2/14 22 2/10	365257 A	2/6/91			NA
(9)	BROTHERS SUE ANN #A, 77 BOJAY, MICHAEL	✓	UNBOOKICILED Ruth Gen's Hse	BOJAY, BLAKE (02) (10/21/88) SHELTER LM 709-265-8262	3/5	LUSETTI RL 2/14 2814 2818	373383 A T358760	2/6/91			
(10)	WILLSTON, BERNETTA #24	✓	UNBOOKICILED 1148 N MILWAUKEE (Corp P.A. Address) 501 W Park Ridge	WILLSTON, ETTA (83) (9/18/74) WILLSTON, JASON (04) (11/27/90)	2/5-6M 2/26	CAS/Array RL 2/20	373584 A&B 7433900	2/6/91			NA
				WILLSTON, BERNETTA L (05) (5/24/90) Norma Herrera 8345 S Justine 779-7384							
(11)	MERCED, ALFONSO #A22, 24		5115 N. OAKLEY CHGO, IL 728-9925	MERCED, ROGER (03) FHB (1/21/78) Mary Guerrero Guardian 3050 N Lawndale 267-0424	2/22	2/22	373919A TOM 8300	2/16/91 2/22/91			
				MERCED, MARY (04) (4/14/86) MERCED, ANDREW (05) (5/24/87)							
(12)	BARNETT, JUANITA #24		P.O Box 4962 - Sparks, Nev 89432 702-329-4907 1435 SUMMIT ELGIN, IL (708) 741-1609	CORREA, VERONICA (5/30/91)		2840 Ellis GH 4/21 2840 Hampton	Not in system 1710296 368830	4/6/91			
(13)	ALLENS, JANICE #24		2044 DODGE EVANSTON	ALLEN, JANICE (6/15/88)	3/1		372326 A				

INTERIM RVICE TEAM - CASE LOG TEAM 2B_ _AREA

C = Cocaine Identified Problem

A 011 '7

	FAMILY NAME	C	ADDRESS	CHIDREN/WHEREABOUTS	First Contact	DCP-TMI IST/MRK/DT 2640	SCR # I.D.#	EARLY RESP CASE REC.	TC/SUP DATE	NEXT CT DATE	XFER DATE/TM
(14)	Davis, Joyce		1817 S Seaside Hanover, In (788)537-4425	Joyce, Angel (dtr) (step)	3/14	Homeless PJ 3/27	1D3264 H R781820	3/24 3/24	3/24 4/24	3/24 4/24	

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INTERI.. SERVICE TEAM - CASE LOG TEAM 2B ____ AREA

Feb., 1990 C = Cocaine Identified Problem

2B0697 EAO

A 011039

FAMILY NAME	C	ADDRESS	CHIDREN/WHEREABOUTS	First Contact	DCP-TMI IST/NRK/DT	SCR # I.D.#	EARLY RESP CASE REC.	TC/SUP DATE / NEXT CT DATE	XFER DATE/TH
Major, Cecelia Cyc Assessment		5041 So. Federal Apt. 901	DeAngelo Roberts Quentez Roberts HMP	CYC 2/5/90	2B14 DB 3/9/90	368424A J379000	2/2/90	2.25 supv. 1/19/90 Calc. 19 CT: 2-23-90	6/6/90 Closed
Phillips, Mary From SAO		LKA 7811 S. Ellis 11730 S. Lowe St. Catherine Shelter	01) Selena Phillips 02) Timothy N. Phillips FHP Central Dept	FHP 2/9/90	2B43 F.E. 3/6/90	277982E V0893100	2/2/90 2/14/90	T.w 2/1/90 Calc. 19 CT: 2/9/90 CT: 4/9/90	4/9/90 SAO 2B0?: Phillips Returned To EAO 2B63 Sup. 10
			Fula Molea 5200 So. Princeton 955-1290						
			05) Cocretia Blackwell 12) Curtis Phillips FHP Central Dept.	FHP					
			Velma Ackerson 2015 W. 64th 476-2184						
			07) Robert Phillips 4911 N. Kenmore Mabel Johnson 626-7235	FHP 2/9/90					
Burns, Kimberly		6557 S. Eberhart	01) Jasmine Bullard NMR Lois Jackson 9911 S. Michigan 995-1537		2B13 KW 3/6/90	997316? 1156200	2/7/90	T.w: 1/19/90 C.T.: 2/6/90	Case to Kim T. SAO/EST
McCoy, Barbara	✓	6531 So. Lowe #630	03) Maretha McCoy NMR Ruthie McCoy 3547 S. Federal 548-6351 #307		2B45 J.H. 2/6/90	367819A H5529000	2/8/90	T.L: 1/29/90 Calc: 19 CT: 3/13/90	3/5/90 EAO 2B09 to:
			04) Stephanie McCoy NMR Theresa Jackson 1426 S. Normal Riverside 849-5247						
Braithwright, Kathy From SAO		3240 E. 91st St.	Braithwright, Kathy HMP	2/16/90	2B43 F.E. 2/13/90	369541A H5559000	2/6/90 3/1/90	F.D.: 2/28/90 225 Supv. Calc: 19 CT: 4/4/90	4/9/90 SAO 2B0? Barnett

Feb 1990

INTERI.. SERVICE TEAM - CASE LOG TEAM 2B AREA 2B0697 EAD

A 011040

C = Cocaine Identified Problem

FAMILY NAME	C	ADDRESS	CHILDREN/WHEREABOUTS	First Contact	DCP-THI IST/MRK/DT	SCR # I.D.#	EARLY RESP CASE REC.	TC/SUP DATE / NEXT CT DATE	XFER DATE/TM
Viverette, Curry Kazee, Roselynn Fm SAO 2/13/90		1614 Ellis Ford Heights 758-5414	Tiffany Kazee HMP	2/23/90	2B16 D.B 2/14/90	226233C M969960	2/8/90	225 Sup: 4/10/90 Cal: 7 CT: 3/23/90	4/14/90 SAO - Nancy 2B33 Cook
Gardner, Keith Gardner, Shirley		4409 So. Halsted 624-7943	Gardner, Melonie HMP	2/21/90	2B14 R.W 2/14/90	372554A Y427900	2/14/90	2.25 Sup: 2/5/90 Cal 17 CT: 3/23/90	4/14/90 EAD 2B62 Cook
Moore, Linda Levi, Wilbert SAO		426 Calumet Blvd. Harvey, Il. From SAO 2/16/90	(03) Moore Jamani Loyola Hosp		2B46 L.J. 2/14/90	371196A T359900	2/14/90	T.W. 2/13/90 Cal 13 CT: 3/13/90	3/13/90 SAO - Nancy 2B62 Cook
Taylor, James		1245 W. 69th St.	(04) Scott, James 12/20/74 ESE/Cameo	2/23/90	2B47 R.W. 2/14/90	373867A Y456900	2/16/90	T.R: 2/14/90 Cal: 13 CT: 4-4-90	5/4/90 SAO 2B2 Cook
Hendricks, Deborah CYC assign 2/22/90	✓	4101 S. Federal	(03) Hendricks, Latricia Evanston Hosp. T.R. 3/22/90	CYC	2B98 DB 2/20/90	184477D H560900	2/21/90 2/26/90	F.D: 3/22/90 T.R: 3/22/90 Cal: Cal 17 CT: 3-27-90	4/11/90 SAO 2B62 Cook
Beeks, Moneia		2450 S. State Apt. 302	(03) Antoine Vaughn ESE/Cameo		2B45 D.H 2/22/90	161776I T520890	2/21/90	T.R: 2/21/90 Cal: 7 CT: 3/21/90	3/22/90 SAO 2B62 Cook
			(04) Anthony Vaughn Wyler's Hosp						
Adams, Tracy	✓	5140 S. Loomis 2nd Flr.	Amanda Adams Twin Antoine Adams Steven Adams HMP	2/21/90	2B45 F.E. 2/20/90	248940D T396870	2/21/90	F.D: 3/8/90 T.W: 3-8-90 Cal: 7 CT: 4/10/90	4-11-90 SAO THP 2B62 Cook
Macon, Kathy	✓	7752 S. Racine Apt 3C 846-4760	Raven Moon Reynold " Rhonda " HMP		2B43 L J 2/21/90	374738A H566900	2/26/90 3/9/90	F.D: 3/14/90	Antoine Family Fun Visit 21 Lee
Jones, Ruth CYC 2/22/90	✓	5311 S. Bishop	Aisha Adams Fatima " Shanita " HMP	2/21/90	2B45 DB 3/21/90	153136 S999800	2/26/90 3/26/90	P.O. 2/23/90 Cal T.R. 3/21/90 CT 4/12/90	4-18 SAO 2B42 Cook

Feb 1990

Page 3 of 3

C = Cocaine Identified Problem

INTERI.. SERVICE TEAM - CASE LOG TEAM 2B ____ AREA

A 011041

FAMILY NAME	C	ADDRESS	CHIDREN/WHEREABOUTS	First Contact	DCP-THS IST/WRK/DT	SCR # I.D.#	EARLY RESP CASE REC.	TC/SUP DATE	NEXT CT DATE	XFER DATE/TM
Baker, Marianne		2430 S. State Apt. 305	03) Carl Baker	C4C	2845	374954A	2/22/90	T.W 2/22/90		
C4C 2/28/90			04) Catherine Baker		DB 3/27/90	Y4739000	3/1/90	Cal 17		
			[redacted] Baker					CT: 4/2/90		
			06) Geneva Rutherford ESC							
			08) Travis Rutherford ESC							
Bailey, Annette		2330 S. State Apt. 602 808-0960	(03) Ali Bailey ESC	2/28/90	2845	375146A	2/27/90	T.W -2/23/90		
					LW 3/27/90	Y4759000	3/1/90	Cal -		
								CT- 4/3/90		
Sanders, Bettina	✓	5147 S. Prairie 2nd flr 538-1868	Antonio Sanders Hosp Carters Children Hosp	3/7/90	2842	3716629		F.D - 3/23/90		
					SG 3/21/90	36028100	2/27/90	2.25 3rd qtr. 6-19-90 CT. Cal: 13		
Parker, Geneva	✓	3835 S. Federal #102	Parker, Robert Hosp Mercy Hosp	3/7/90	2847	336698		F.D. - 3/8/90		3/2.
					LH. 3/26/90	H0848900	2/27/90	2 [illegible] 4/13/90		

FAMILY NAME	C	ADDRESS	CHILDREN/WHEREABOUTS		First Contact	DCP-TM# IST/WRK/DT	SCH # I.D.#	EARLY RESP CASE REC.	TC/SUP DATE	NEXT CT DATE	XFER DATE/TM
Tracy Hancock	X	9351 Lo Mercer	Courtney	Hmp		2B4/3	3660430	1/0	7/1	2/13	
						AS 3½		2/1			
Kelly Ellerby Katherine Lindsey		7831 Lo Cornell	Porscher	Hmp	IP 2/7	2B15	3481158	2/1	7/1	2/21	
						4S 2½		2/7			
Valerie Reed		7743 Lo Crandon	Omar Jamila	Hmp Unmarked Patrol Car	1/5	2B4/2	3711180	2/7	7/1	3/4	
						LC 2½	Y426-90	2/13			
Mary Phillips Referred to Court	TST	unk Advised to contact Parole Officer at home address	Lakeisha Timothy Timothy Courtney Robert	711B	LB/S	2B4/3	2779826	2/7	7/1	2/9	
						10/7 EC 2½	X084-81-246		2/1		
Gene Shannon	X	13249 Lo Lawrence	Jacques Tabina Aisha	Hmp	9/16	2B4/3	3233318	2/5	7/1	2/23	
						CW 2½	R61787	3/2 —	2/2		
Kathy Breidenstein		3340 East 91st Assigned out of area	Patricia	Hmp		2B4/3	2695418	2/6	9/1	2/25	
						2/1			2/2		
Margaret Bradford		7953 Lo Bishop Assigned out of area	Shalonda	Hmp		2B4/3	3725178	2/6	9/1	4/20	
						2/1	Y425-90		2/2		
Brenda Campbell		7845 Lo Mary Assigned out of area	Patrick	Hmp		2B4/2	3711855A	2/0	7D	2/13	
						2/1		2/6	2/2		
William Patterson Jeanette Bennett		9344 Lo Kenwood Referred to family Pres	Adrian Figueroa	Hmp		2B14	3713474	2/6	9/1	2/13	
								2/6	2/3		
Morgan Jefferson	X	1231 9 So Union	Mitchell	Hmp	LB/S	2B4/3	3644330	2/0	TM 2/1	2/1	
						LC 2½	T322-90	2/6	2/1		

1'40 pg 2

INTERIM SERVICE TEAM - CASE LOG TEAM 28 AREA South

C = Cocaine Identified Problem

A 011043

FAMILY NAME	C	ADDRESS	CHILDREN/WHEREABOUTS		First Contact	DCP-TM# IST/WRK/DT	SCR # I.D.#	EARLY RESP CASE REC.	TC/SUP DATE	NEXT CT DATE	XFER DATE/TM
Nina Chay	X	1236 W. 103rd	Tierra Nicole Charles	HMR	<CF>	LC 2/8	3708447 T324-90	NO 2/7	TC 1/31	3/1	
Vincente Cuevas (Assigned ont. Jan. 6		1614 Ellis Ford Hts, Ap 259	Tiffany Latrice Cuevas	HMP	2B1/4	2/1	2262330 M269-86	NO 3/4	1/17 1/31	2/23	
Tawanda Littleton Assigned ont.		LKA: 9251 So Cottage Ave to West Chest	Jimmy Tyson 2-23-76	HMR	2B 2/1	2/1	3711984 T325-90	NC 3/8	TC 4/1	3/16	
Chace Green Carolyn	X	1446 Portland Chgo Hts Rd	Alonzo	HMR	2B4/6 HS 2/13	1769436 M448-85-00	2/4		TC 2/15	3/23	
Diane Pole	X	LKA: 10359 So. Edbrooke	Cassandra Carolyn Valley	HMR	2B 1/4 CN 2/14	3705444 Y3915-90	NO 2/9		TW 2/17	2/21	
Brenda Lewis		47 E. Marquette	Brittany	HMP	2B 1/4 AS 2/14	3733237 T077-84-00	2/13 2/22		TW 2/8	6/6	
Be Lucinda Vasquez	X	8409 So. Exchange	Rudolpho Salazar	EXC	2/1	2B4/3 GW 2/14	3325168 Y432-90	3/13	TW 2/6	3/23	
Diane Brown		1479 W. 114th Pl.	Kyron	ESC		2B4/2 HS 2/16	3727704 M182-86	NO 3/13	TC 2/6	3/4	
Yvette Wyllie Lee Reid		14512 So Parnell Riverdale	Jesse	HMR	2/21	2B4/6 HW 2/16	3707850 T327-90	NC 3/14	TW 1/11	2/23	
Linda Moore		426 Carlemont Blvd Harvey, Ill.	Jasmine	Hayden Whop		2B4/6	3711964 T359-90	2/14	TW 2/15	2/25	

C = Cocaine Identified Problem

A 011044

FAMILY NAME	C	ADDRESS	CHILDREN/WHEREABOUTS	First Contact	DCP-THI IST/MRE/DT	SCR # I.D.#	EARLY RESP CASE REC.	TC/SUP DATE	NEXT CT DATE	XFER DATE/TM
Alicia Turner		Whereabouts unk	Michael Rhonda Brian		2B42 AS 2/16	3726235A T360-90	NO 2/15	TC 2/13	4/3	
Ronald Hogan	X	301 E. 130th, #9	Ronda		2B15 CH 2/16	3738955A	2/16 3/6	TC 2/14	3/22	
Sharon Dorsey		6018 S. Racine	Samantha	Hmp	2B42 CH 2/6	3729465A	NO 2/20	TC Scrapped 3/16	3/7	
Opal Calvin		7040 S. Eberhart	Jamiel	Hmp	2B42 AS 2/23	2651468B C005-88-01	NO 2/22	TC Scrapped 3/20	3/19	
Stacey Steffin	X	22606 Latonia Riceton PK	Pookie	Hmp	2B46 HW 2/23	3722014A T369-90	2/22	MD Not 3/22	4/24	
Karen Land	X	9949 S. Winston	Lara	Hmp	2B42 AS 3/1	3739994A	NO 3/23	TC Scr. 3/16	3/8	
Mary Steele Assigned		6018 S. St Lawrence out of area to West I St	Jamie	Hmp 2B29	2B42	3742184A	NO 2/26	TC Scr. 3/23	3/22	
Kimberly Campbell Assigned		6028 S. Cottage out of area to West I St	Dalvin	Hmp 2B29	2B42	3735564A	NO 2/27	TC Scr. 3/17	3/19	
Kathy Mason	X	7752 S. Racine Referred to Family First	Ronen	Hmp	2B14	3741386	NO 2/21	TC Scr. 3/22	3/19	

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARTIST M., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 88 C 10503
	)	
GORDON JOHNSON, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

In December 1988 plaintiffs filed this action as a class action seeking declaratory and injunctive relief pursuant to the Adoption Assistance and Child Welfare Act of 1980 ("AAA"), 42 U.S.C. §§620-629, 670-679a--either under 42 U.S.C. §1983 ("Section 1983") or perhaps via direct action--and under the Due Process Clause. Plaintiffs simultaneously filed a Motion for Preliminary Injunction and a Motion for Class Certification.

Upon presentation of plaintiffs' motions, defendants concurred in the propriety of certifying two classes of plaintiffs:

> Class A: Children who are or will be the subjects of neglect, dependency or abuse petitions filed in the Circuit Court of Cook County, Juvenile Division ("Juvenile Court"), who are or will be in the custody of Department of Children and Family Services ("DCFS") or in a home under DCFS supervision by an order of Juvenile Court and who are now or will be without a DCFS caseworker for a significant period of time.
>
> Class B: Children who are or will be the subjects of neglect, dependency or abuse petitions filed in Juvenile Court who are or will be placed in DCFS' custody and who are or will be without a DCFS caseworker for a significant period of time.

This Court entered a memorandum order certifying both classes, granting plaintiffs' request for expedited discovery and setting plaintiffs' Motion for Preliminary Injunction for an early evidentiary hearing. After that hearing (the "Hearing") was held, with extensive evidence presented by both sides, the parties presented their post-Hearing submissions.

Defendants in this action are DCFS Director Gordon Johnson ("Johnson") and DCFS Guardianship Administrator Gary Morgan ("Morgan"). 1/ DCFS is the state agency charged with, among other things, investigating allegations of child abuse and neglect throughout Illinois and caring for children and families who are the victims of child abuse and neglect. This action is concerned solely with cases in the Cook County Region.

Plaintiffs complain that DCFS has a policy and practice of failing promptly to assign a caseworker to court cases following the issuance of a temporary custody or protective (or

---

1/ Morgan testified that although he is named personally by the Juvenile Court as the custodian of children placed in the temporary custody of DCFS, day-to-day decisions regarding those children are made by DCFS personnel who are designated agents of the Guardianship Administrator and who are located in the Area Offices, Division of Child Protection, Interim Service Teams, Emergency Services Center and other units directly responsible for serving children in the care of DCFS. Morgan has no line authority over those persons, nor does he have any responsibility for developing generally any policies with respect to the care of children in DCFS' custody, or specifically with respect to the assignment of caseworkers. Accordingly, although named as a defendant, Morgan does not have any responsibility for the alleged practices and policies challenged in this action.

supervision) order and of failing promptly to reassign court cases when a caseworker goes on leave, is terminated or resigns. Plaintiffs claim that alleged policy and practice violates both AAA and the Due Process Clause.

This Court has previously deferred issuance of its findings of fact and conclusions of law for two reasons impacting importantly on the availability and propriety of preliminary injunctive relief:

1. the known imminence of post-Hearing Supreme Court decisions in key areas affecting the core of plaintiffs' claims and

2. DCFS testimony at the Hearing as to its then recent adoption and ongoing implementation of a restructuring plan to address caseworker assignment delays directly.

Now the end of the Term has come, the Supreme Court decisions have indeed been handed down, and it appears that they may perhaps have gutted much if not all of plaintiffs' potential predicates for obtaining relief. This memorandum opinion and order addresses the case in its present posture.

As for plaintiffs' claim under Section 1983, Will v. Michigan Department of State Police, 109 S.Ct. 2304, 2312 (1989) has now announced that no action against a state or against its officials qua officials (the capacity in which Johnson is in fact sued here) can proceed under that statute:

> We hold that neither a State nor its officials acting in their official capacities are "persons" under §1983.

To be sure, Will, id. at 2311 n.10 (citations omitted) tempers that seemingly unqualified pronouncement with an "of course" hedge that draws upon the familiar fiction that informs Ex parte Young and its progeny--that a State cannot act unconstitutionally, so that any state official who violates anyone's constitutional rights is perforce stripped of his or her official character:

> Of course a State official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because "official-capacity actions for prospective relief are not treated as actions against the State."...This distinction is "commonplace in sovereign immunity doctrine,"...and would not have been foreign to the 19th-century Congress that enacted §1983....

But in this instance that stated limitation on the newly-announced Will ruling marks a need for further inquiry rather than the end of the matter.

As stated at the outset of this opinion, plaintiffs ask for declaratory and injunctive relief. But the injunction they seek is not the garden-variety limited restraint on an individual defendant's conduct. Instead it calls for mandatory relief that would, if granted, impose a major financial burden on the State of Illinois. As Edelman v. Jordan, 415 U.S. 651, 666 (1974) said: 2/

2/ Although the Edelman discussion (like that in Quern [cited next in the text] and all the other cases treating with the issue now under consideration) occurs not in a Section 1983 case but in the Eleventh Amendment context, Justice Brennan's dissenting opinion for four Justices in Will, 109 S.Ct. at 2312 seems accurate in stating:

> Like the guest who wouldn't leave, however, the

> We do not read Ex parte Young or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled "equitable" in nature.

If the reason the State cannot be sued under Section 1983 is indeed the bar against invading the sovereign's fisc without its consent, that identical consequence would flow from the decree sought by plaintiffs, though nominally injunctive in form and though nominally issued against state official Johnson rather than the State itself. It is of course true that for Eleventh Amendment purposes the Court has distinguished between retrospective relief (held impermissible) and prospective relief (held permissible), stating in Quern v. Jordan, 440 U.S. 332, 337 (1979)(citations and footnote omitted): 3/

> In Edelman we reaffirmed the rule that had evolved in our earlier cases that a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment....We rejected the notion that simply because the lower court's grant of retroactive benefits had been styled "equitable restitution" it was permissible under the Eleventh Amendment. But we also pointed out that under the

Footnote Continued

> Eleventh Amendment lurks everywhere in today's decision and, in truth, determines its outcome.

> But it is not necessary for today's purposes to choose sides between the majority and minority opinions in Will. What is most significant is that Edelman and like cases draw on the notion of the State as sovereign, the identical concept that the Court majority in Will relies on in finding the State cannot be a Section 1983 "person."

3/ Will, 109 S.Ct. at 2309 n.6 rejects one of the petitioner's arguments there as "no more than an attempt to have this Court reconsider Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), which we decline to do."

> landmark decision in Ex parte Young, 209 U.S. 123 (1908), a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury....The distinction between that relief permissible under the doctrine of Ex parte Young and that found barred in Edelman was the difference between prospective relief on one hand and retrospective relief on the other.

But will that Eleventh Amendment parallel extend chapter and verse to Section 1983? Is form to prevail over substance, so that this action will lie under Section 1983 in accordance with Will's n.10 exception? Or does the real-world major financial impact of the relief demanded by plaintiffs mean that Will's general rule barring Section 1983 actions against the State and its officials as surrogates for the State is to control here?

If the latter is the proper reading of Will, it would sap of any real force the cases on which plaintiffs have placed their principal reliance for purposes of AAA-related relief: L.J. v. Massinga, 838 F.2d 118 (4th Cir. 1988); Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983); and see Del A. v. Edwards, 855 F.2d 1148 (5th Cir. 1988). Both L.J., 838 F.2d at 123 and Lynch, 719 F.2d at 509-10 held AAA privately enforceable under Section 1983, and to that extent they would clearly be overturned by such a construction of Will. As for Del A., the Court of Appeals there vacated the panel opinion and granted rehearing en banc (862 F.2d 1107 (5th Cir. 1988)), following which the case has been dismissed February 28, 1989. And of course Will would then moot defendants' reliance on Spielman v. Hildebrand, 873 F.2d 1377, 1386 (10th Cir. 1989),

which had expressed "considerable doubt whether [AAA] confers any substantive rights that can be the subject of an action for damages under section 1983."

Finally, if Will were to foreclose plaintiffs' access to Section 1983, their right to relief in this action would have to stem--if at all--from one or both of (1) an implied direct private action for defendants' claimed violations of AAA or (2) plaintiffs' stated claim under the Due Process Clause. Each of those alternatives bears examination here.

AAA unquestionably does not by its terms afford parties in plaintiffs' situation an express cause of action. And plaintiffs have really not responded to defendants' Proposed Conclusion 8, which points to the increasingly restrictive reading that the Supreme Court has given to implied private actions--a much more demanding standard than Cort v. Ash, 422 U.S. 66 (1975) was initially thought to have established. Most recently our Court of Appeals has spoken to that issue in King v. Gibbs, 1989 U.S. App. LEXIS 8718, at 15-16 (7th Cir.):

> The Supreme Court, in Cort v. Ash, set out a four-part test to determine whether a private right of action should be implied from a statute:
>
> > First, is the plaintiff "one of the class for whose especial benefit the statute was enacted,"...? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 78 (citations omitted).

> In its recent pronouncements, the Court has reaffirmed the use of the Cort test but has also made it clear that the principal focus is on the second of the Cort factors--whether the legislature intended to create a private cause of action. See Cannon v. University of Chicago, 441 U.S. 677 (1979); Touche Ross & Co. v. Redington, 422 U.S. 560, 568 (1979). The first and third of the Cort factors are aids in determining that intent, Touche Ross, 422 U.S. at 575-76; see also P. Bator, D. Meltzer, P. Mishkin, D. Shapiro, The Federal Courts and the Federal System 946 (1988), and, by negative implication, it is unclear whether the fourth Cort factor--whether the cause of action is generally thought of as a matter of state concern--has any continuing significance. But see Merrill Lynch, Pierce, Fenner & Smith v. Curran, 465 U.S. 353, 393 (1982)(Court noted that fourth Cort factor favored implying private right of action under a provision of the Commodities Exchange Act.). In sum, unless a congressional intent to create the right of action "can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 94 (1981).

At least until otherwise demonstrated, then, it must be considered that AAA provides plaintiffs no direct ticket of entry to this federal court.

As for plaintiffs' claim sounding in due process, DeShaney v. Winnebago County Department of Social Services, 109 S.Ct. 998 (1989)--albeit in a different context--has most recently reconfirmed the restricted scope of States' obligations to their citizens under notions of substantive due process. DeShaney emphasized the nature of the Due Process Clause as a charter of negative liberties rather than as an affirmative guaranty.

To be sure, in the course of its DeShaney discussion the Court reconfirmed the existence of "certain limited circumstances [in which] the Constitution imposes on the State affirmative duties of care and protection with respect to particular individuals" (id. at 1004-05, and see generally the entire discussion in Part II of the opinion, id. at 1002-07). But DeShaney specifically did not retreat from the principles announced in the Court's two decisions during the October 1985 Term delimiting the scope of substantive due process (id. at 1003):

> Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression," Davidson v. Cannon, [474 U.S.] at 348, 106 S.Ct., at 670 [1986]; see also Daniels v. Williams, [id.] at 331, 106 S.Ct., at 665 [1986] ("'"to secure the individual from the arbitrary exercise of the powers of government,"'" and "to prevent governmental power from being 'used for purposes of oppression'")(internal citations omitted); Parratt v. Taylor, 451 U.S. 527, 549, 101 S.Ct. 1908, 1919, 68 L.Ed.2d 420 (1981)(Powell, J., concurring in result)(to prevent the "affirmative abuse of power"). Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.

Both Daniels, 474 U.S. at 331 (emphasis in original) ("Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property") and Davidson, id. at 347 ("In Daniels, we held that the Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty, or property") emphasized that the harm complained of must have

been intended by the public official, rather than negligently inflicted. And because DeShaney dealt with petitioners to whom the State did not owe the special level of responsibility that runs in favor of persons in state custody, the Court was not called on to specify whether the Daniels-Davidson standard of intentionally inflicted harm or some lesser benchmark was required in the "special relationships" situations discussed in Part II of the opinion. As to persons in plaintiffs' position, then, a double question exists: whether they stand in the "special relationships" category and, if so, what standard is prescribed by the requirements of substantive due process.

In summary, the posture of plaintiffs' claims appears to be this:

1. Input is required from both sides as to whether Section 1983 (assuming arguendo that DCFS were held to have violated AAA) has been rendered unavailable to plaintiffs by Will.

2. Unless plaintiffs can demonstrate otherwise, any contentions they have advanced as to an implied private cause of action created by AAA itself must be rejected for lack of subject matter jurisdiction.

3. Any contention that plaintiffs seek to ground in the Due Process Clause depends on the standard applicable to such contention--whether that of intentionally inflicted harm (a standard that plaintiffs clearly cannot meet) or something less (a question whose answer may

depend on what that "something less" is). 4/

Both sides are directed to file contemporaneous supplemental submissions on those legal issues in this Court's chambers on or before August 4, 1989. Because it may also be relevant to determine what has happened since the Hearing to the plan described in defendants' Hearing testimony, defendants are ordered to include a brief statement of the current posture of that plan as part of their submission. This action is set for a status hearing at 9 a.m. August 15, 1989 to discuss (1) whether anything further will be required in the latter respect and also (2) the ultimate disposition of the preliminary injunction motion.

Milton I. Shadur
United States District Judge

Date: July 24, 1989

4/ Both sides should also review our Court of Appeals' two-week-old en banc decision in Easter House v. Felder, No. 86-2164, slip op. (7th Cir. July 11, 1989). Easter House cuts such a wide swath out of Section 1983's coverage, and it is so new, that its potential implications even for a substantive due process claim such as that advanced by plaintiffs here should be looked at.

Supreme Court, U.S.
FILED
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No. 90-1488

In The

Supreme Court of the United States

October Term, 1990

SUE SUTER, *et al.*,

Petitioners,

v.

ARTIST M., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE STATES OF LOUISIANA, ALABAMA, ARIZONA, COLORADO, DELAWARE, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Section 671(a)(15) of Title IV-E of the Adoption Assistance and Child Welfare Act of 1980 (the "AAA"), 42 U.S.C. § 671(a)(15), which requires that states have a plan to ensure that "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home," is too vague and amorphous to create an individually enforceable right under 42 U.S.C. § 1983 ("Section 1983") in the complex area of child welfare.

2. Whether children living at home, who are not in foster care, have enforceable rights under Title IV-E of the AAA, which provides reimbursement for "foster care maintenance payments," when the states receive no federal Title IV-E funds to provide services to those children.

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INTEREST OF AMICI CURIAE

Amici are states that, like Illinois, accept federal reimbursement for "foster care maintenance payments" under Title IV-E of the AAA, a federal-state cooperative funding statute.[1] *Amici* also accept federal funds under numerous other spending-clause statutes.

The Seventh Circuit's decision in *Artist M. v. Johnson*, 917 F.2d 980 (7th Cir. 1990), which holds that the AAA's vague "reason-

[1]Because this brief is filed on behalf of states by their respective attorneys general, and the District of Columbia by its authorized law officer, its filing does not require consent of respondent or the Court. *See* Sup. Ct. R. 37.5.

able efforts" clause, 42 U.S.C. § 671(a)(15),[2] creates enforceable rights under Section 1983 and extends those rights to children residing at home, for whom the states receive no federal Title IV-E funds, adversely affects all states that accept Title IV-E reimbursement. Moreover, applied to other imprecise spending-clause statutes, the *Artist M.* precedent will impose upon the states a host of new federally-imposed obligations to persons for whom the states receive no federal money, based on statutes so vague that the states could not possibly have known of their specific obligations when they accepted federal funds.

REASONS FOR GRANTING THE WRIT

For more than a decade, the states have been developing and expanding foster care services funded in part through federal reimbursement under Title IV-E of the AAA. In 1980, Congress enacted the AAA as an amendment to the Social Security Act. The cooperative funding statute was designed to create "fiscal incentives to encourage a more active and systematic monitoring of children in the foster care system." *Vermont Dep't of Social & Rehabilitation Servs. v. United States Dep't of Health & Human Servs.*, 798 F.2d 57, 59 (2d Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987). To create those "incentives," Title IV-E provides reimbursement for foster care costs in exchange for adoption of a state plan meeting certain requirements, including establishment of a case planning process and case review system, both clearly defined in the statute. *See* 42 U.S.C. §§ 671(a)(16), 675(1),(5),(6).

---

[2]Section 671(a)(15) provides, in pertinent part:

> In order for a State to be eligible for [foster care maintenance] payments under this part, it shall have a plan approved by the Secretary which—
>
> . . .
>
> (15)...provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

Using the analogy suggested by this Court in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981), those precise terms set out the "contract" to which a state is bound when it accepts federal funds.

To those precisely defined procedural mandates, Congress added the "reasonable efforts" requirement of Section 671(a)(15). *See* 42 U.S.C. §§ 671, 672. Nowhere does the statute define "reasonable efforts," however, recognizing instead that what is "reasonable" depends on the unique circumstances of each individual case and, hence, that such determinations should be left to the states. Thus, Title IV-E carefully balances certain specific procedural requirements with a recognition that child welfare decision making is a difficult process, best committed to specialists at the state level with both expertise and knowledge of the unique circumstances of individual cases.

The Seventh Circuit's opinion in this case upsets the careful balance of federal and state interests enacted by Congress in Title IV-E. Because Congress did not define "reasonable efforts," and because the term is too vague and amorphous to be defined by the courts without external guidance, the Seventh Circuit looked to Illinois' own voluntary practices to determine what the AAA requires. *See* App. 11a.[3] That approach leads to the incongruous result that the AAA creates different federal rights in different states, and the possibility that states with more extensive child welfare programs will have more extensive obligations under federal law. By *discouraging* expansion of state child welfare services, such a result flatly contradicts congressional intent to "encourage" improvements in those systems.

Under the Seventh Circuit's opinion, states can no longer ascertain the parameters of their potential liability when they agree to participate in a federal-state cooperative funding program. In-

[3]All "App." citations are to the Appendix to the Petition for a Writ of Certiorari.

deed, the court below holds that, by accepting federal reimbursement for certain *foster care* costs, the states also unwittingly accept liability under Section 1983 to children *not* in foster care, for whom the states receive *no* Title IV-E money. That holding has implications far beyond the circumstances of *Artist M.* and the AAA. *Artist M.* potentially expands states' obligations under all federal-state funding statutes and creates an unacceptable level of uncertainty surrounding the commitment states make when accepting federal funds. *Amici* therefore urge this Court to grant the writ of *certiorari* and to reverse the Seventh Circuit's decision.

I.

BECAUSE THE "REASONABLE EFFORTS" CLAUSE IS VAGUE AND UNDEFINED, THE OPINION BELOW CREATES DIFFERENT FEDERAL RIGHTS FOR DIFFERENT STATES, DISTORTS STATE CHILD WELFARE DECISIONS, AND CREATES A RISK OF INCONSISTENT "RIGHTS"

The opinion below holds that the AAA's vague and amorphous "reasonable efforts" clause creates individually enforceable federal rights. By looking to Illinois' own actions in determining the contours of those rights, the Seventh Circuit's analysis leads to the result that a vague statute may create different federal rights in different states. Similarly, because the statutory language is imprecise and undefined, a finding of enforceability exposes the states to countless lawsuits, based on each plaintiff's notion of "reasonableness," with the risk of inconsistent judgments and expanded federal intervention into individual state child welfare decisions.

Nor are these consequences limited to the AAA or the child welfare area. The Seventh Circuit's analysis serves as a precedent for interpretation of other spending-clause statutes, which will

lead to the creation of a host of novel rights without any showing of congressional intent to do so. The Seventh Circuit's opinion is nothing less than an abandonment of the "contract" theory of federal funding statutes set out in *Pennhurst* and its progeny. The *Artist M.* court's failure to replace that theory with any similar framework results in the transformation of federal-state cooperative funding statutes into empty vessels, to be filled after enactment by creating "rights" based on the facts of individual cases.

A. The Opinion Below Holds That Federal Law Creates Different Federally Enforceable Rights In Different States

The Seventh Circuit's majority reasons that because Congress directed the states to devise a plan to provide reasonable efforts and left the method of delivery up to the states, each state's actions to develop programs and provide services are determinative of that state's liability under the "reasonable efforts" clause. Following this analysis, the court holds that Illinois' decision "to use caseworkers as the means through which these services are provided" creates an enforceable right to have a caseworker assigned within three days. (App. 11a). If Illinois had chosen some additional means, the statute presumably would have created a right to those mechanisms. That holding leads to the anomalous conclusion that a single federal statute creates wholly different rights in different states, and indeed defeats the very purposes for which Congress enacted the AAA.

Child welfare is not based on a single practice model in every state. What one state may consider "reasonable efforts" may be unreasonable in another state due to differences in client population and available resources. Even within a single state, there are distinct variances from region to region depending on such factors as whether the region encompasses an urban area or rural communities. Indeed, as Congress recognized explicitly in Section

671(a)(15), "reasonable efforts" depend on the facts of each individual case.[4]

Because states use different means to provide disparate services, under *Artist M.* they are subject to varying federally enforceable rights under the AAA. That outcome is contrary to this Court's holding in *Pennhurst*, 451 U.S. 1. In *Pennhurst*, this Court held that a federal funding statute creates enforceable rights only if the states know, *ex ante*, what responsibilities they are assuming. *Id.* at 24-25. The notion of rights based on state actions *after* accepting federal funds is flatly inconsistent with the requirement that states be able to ascertain their obligations *before* accepting the "contract."

More important, the Seventh Circuit's analysis discourages change and improvement in state child welfare programs. Under *Artist M.*, a state adopting new child welfare programs will face increased obligations under the AAA, since the state presumably will have determined that the more extensive services are "reasonable." Moreover, much progress in this area is accomplished through pilot programs, testing new approaches with limited populations. If every child in the system may claim a "right" to all such resources, many programs will never see the light of day.

The AAA was intended to create *incentives* for new programs and approaches to child welfare; the Seventh Circuit's decision undermines that goal. In so doing, the opinion below may cause incalculable harm to the abused and neglected children, and their families, served by child welfare agencies throughout the country.

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[4]The House Report on Title IV-E "recognizes that the preventive services requirement would be inappropriate in certain specific circumstances." H.R. Rep. No. 96-136, 96th Cong., 1st Sess. 47 (1979). Thus, in some cases, "reasonable efforts" equal *no* efforts.

B. The Opinion Below Greatly Expands Federal-Court Intervention Into Individual State Child Welfare Decisions, Distorting Those Decisions And Creating A Risk of Inconsistent "Rights"

The opinion below holds that every child served by a state child welfare agency may sue the state when that child, or the child's advocate, believes that the state's efforts have not been "reasonable." *See* App. 29a (Manion, J., dissenting). Thus, by creating enforceable rights from an undefined and vague statutory term, the Seventh Circuit has held that federal judges may give definition to that language, based on the pleas of individual plaintiffs in isolated cases, thereby creating a powerful and unintended vehicle for expansion of federal rights. In the words of the dissent below, the panel opinion opens the door to an "avalanche" of litigation and turns the federal courts into "crisis administrator[s] of child welfare." (App. 29a-30a (Manion, J., dissenting)).

Nor is that "avalanche" merely a wild-eyed prediction: it has already begun. As discussed in the Petition, many states presently face actions raising "reasonable efforts" claims. *See* Petition at 8-9 (collecting cases). In one such action, *Norman v. Johnson*, 739 F. Supp. 1182 (N.D. Ill. 1990), the district court, following the district court opinion in *Artist M.*, held that Illinois' efforts to reunite two individual families were not "reasonable," and entered individualized injunctions. In the case of a third plaintiff, the court found the state's efforts "reasonable," but stated that the court might reconsider that ruling if the state did not provide the plaintiff with sufficient beds. *Id.* at 1208 & n.8 (Report and Recommendation of Magistrate adopted by district court). Nothing in the AAA foreshadows such federal judicial micro-management of individual foster-care cases.

One problem with such judicial second-guessing in individual cases is that child abuse does not lend itself to pat solutions. Reasonable minds may differ, and in judicial hindsight it is all too

easy to equate "reasonable efforts" with "successful efforts." That pitfall cannot be avoided when "reasonable efforts" determinations are made by federal judges on the facts of isolated cases.

As Congress recognized in leaving the contours of "reasonable efforts" to the states,[5] child welfare is primarily an area of state concern and expertise. *See, e.g.*, S. Rep. No. 336, 96th Cong., 2d Sess. 1, 16, *reprinted in* 1980 U.S. Code Cong. & Admin. News 1448, 1466 (recognizing that states have "primary responsibility" for child welfare). It is an area of complex problems without easy solutions. *See, e.g., DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 304 (7th Cir. 1987) (child welfare decision making "is a task as difficult as it is delicate, and we doubt that it will be performed better under the eyes of federal courts . . . than by the state judicial and administrative authorities"), *aff'd*, 109 S. Ct. 998 (1989).

In enacting Title IV-E, Congress contemplated that *state* juvenile courts would act as the primary check on states' compliance with the "reasonable efforts" requirement. Under Section 672(1) of the AAA, prior to removing a child from the home, the state must obtain a "judicial determination to the effect that continuation therein would be contrary to the welfare of such child *and . . . that reasonable efforts . . . have been made*." 42 U.S.C. § 672(1) (emphasis added). Thus, Congress clearly intended that "reasonable efforts" determinations be made by state juvenile courts, which have extensive experience in the area and a detailed grasp of individual cases.

---

[5]*See, e.g.*, H.R. Rep. No. 96-136, 96th Cong., 1st Sess. 47 (1979) ("The decision as to the appropriateness of specific situations will have to be made by the administering agency having immediate responsibility for the care of the child."). *Cf.* 45 C.F.R. § 1357.15(e)(2) (listing examples of preventive or reunification services that states "*may*" provide in individual cases).

The opinion below instead thrusts these complex issues before federal judges, setting them up as "super-juvenile courts." As the dissent predicts:

> Ironically, this decision, while attempting to advance the well-being of abused children, may instead result in the delay or denial of benefits. Delay and denial will result because standing for injunctive and declaratory relief has now been extended to every plaintiff with a notion of "reasonable efforts" that conflicts with that of the DCFS. The DCFS will most likely experience considerable paralysis because any efforts deemed unreasonable by scrutinizing plaintiffs and courts could cease, resulting in no remedial efforts while litigation continues in situations where something must be done.

(App. 30a (Manion, J., dissenting)).

By requiring federal judges to determine what constitute "reasonable" child welfare practices in individual cases, the opinion below exposes the states to the risk of numerous federal decisions creating inconsistent obligations. Rather than choosing the appropriate balance of resources, so that the states may serve the most children in the most effective and efficient manner possible, a judge is forced to decide what allocation of resources is "reasonable" based on the facts of one individual's case. Multiplied by dozens of decisions, each based on a limited view of the landscape, the opinion below will result in a distortion of priorities across the child welfare system.

At present, the states are striving to deal effectively with the growing national problem of abused and neglected children. The Seventh Circuit's decision in this case sets that struggle back immeasurably. Because of the court's error in this case, and because that error may soon be compounded in other spending-clause cases, *amici* urge this Court to issue the writ of certiorari.

II.

THE EXTENSION OF ENFORCEABLE RIGHTS TO CHILDREN FOR WHOM THE STATES RECEIVE NO FEDERAL TITLE IV-E FUNDS REMOVES A CRUCIAL LIMITATION ON FEDERAL COURT POWER TO CREATE ENFORCEABLE RIGHTS

The Seventh Circuit's opinion holds that Title IV-E of the AAA creates enforceable rights on behalf of children residing at home, for whom the states receive no federal money under Title IV-E. (App. 18a). With that stroke of the pen, the *Artist M.* court has abolished the most fundamental limitation on the power of courts to create federally enforceable rights from federal-state cooperative funding statutes: Congress creates no rights without federal funding. *See Pennhurst*, 451 U.S. at 24.

The impact on the states of the Seventh Circuit's holding—that federal funding statutes may create rights without providing *any* money to meet those obligations—extends well beyond the area of child welfare and the AAA. The AAA is one of hundreds of federal-state cooperative funding statutes. Under this decision, plaintiffs potentially may sue to enforce "rights" under those statutes whether or not the states receive federal funds with which to serve those plaintiffs. That result contravenes principles of federalism and fairness, and should be reviewed by this Court.

CONCLUSION

For the reasons stated herein and in the Petition, *amici* respectfully urge this Court to issue a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Dated: April 19, 1991

Respectfully submitted,

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Supreme Court, U.S.
FILED
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(4)

No. 90-1488

In The

Supreme Court of the United States

October Term, 1990

SUE SUTER, et al.,

Petitioners,

v.

ARTIST M., et al.,

Respondents.

On Writ Of Certiorari To United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed March 20, 1991
Certiorari Granted May 13, 1991

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The following opinions, decisions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

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CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12/14/88	Filed complaint
12/16/88	Filed plaintiffs' motion for preliminary injunction.
12/16/88	Filed plaintiffs' motion for class certification. Memorandum order entered. Accordingly, this court determines under Rule 23(c)(1) that this action is to be maintained as a class action with respect to the members of each of Class A and Class B. All proceedings in this action shall be conducted in accordance with the provisions of Rule 23.
01/17/89	Injunction hearing begins. Evidence heard in part. Injunction hearing continued to January 18, 1989, at 10:00 a.m.
01/18/89	Preliminary injunction resumed and continued to January 19, 1989, at 9:45 a.m.
01/19/89	Injunction hearing resumed and concluded. Proofs closed.
08/25/89	Filed defendants' motion to dismiss.
11/21/89	Memorandum opinion and order entered. Accordingly, defendants' motion to dismiss is granted only as to plaintiffs' due process claim. It is denied in all other respects.
11/30/89	Filed defendants' supplemental report to the court concerning DCFS's case assignment plan.
12/07/89	Defendants' motion for reconsideration and, in the alternative, motion to certify questions for appeal is denied.

DATE	PROCEEDINGS
01/19/90	Filed plaintiffs' response to defendants' reports to the court.
02/02/90	Filed defendants' reply to plaintiffs' response to defendants' reports to the court.
02/12/90	Filed defendants' supplemental reply regarding defendants' reports to the court and in opposition to plaintiffs' motion for preliminary injunction.
02/20/90	Filed plaintiffs' supplemental submission regarding defendants' caseworker assignment practices.
03/02/90	Filed plaintiffs' motion for amendment and execution of preliminary injunction order.
03/02/90	Preliminary injunction order entered.
03/30/90	Filed defendants' notice of appeal from orders dated 3/2/90 and 11/21/89.
04/03/90	Order entered on plaintiffs' request for mechanism by which defendants' compliance with the preliminary injunction can be assessed.
04/09/90	Order issued: Defendants' motion to stay preliminary injunction pending appeal is denied.
05/09/90	U.S. Court of Appeals issues order granting motion to expedite appeal.
05/16/90	U.S. Court of Appeals issues order denying motion for stay.
06/20/90	Case heard and taken under advisement by panel. Circuit Judge Walter J. Cummings, Circuit Judge Daniel A. Manion, Sr. Circuit Judge Jesse E. Eschbach.

DATE	PROCEEDINGS
06/21/90	Order issued: The preliminary injunction entered by the district court requires that the DCFS assign a caseworker within three working days from the time plaintiffs' cases are first heard in juvenile court as well as within three working days from the time a previously assigned caseworker relinquishes any portion of a case. The case is remanded for entry of factual findings with respect to the current amount of delay in caseworker assignment and reassignment. We request that the findings be made as soon as possible, but no later than 7/26/90.
06/27/90	Order issued: Our order of 6/21/90 remanded this appeal to the district court for entry of factual findings with respect to the current amount of delay in caseworker assignment and reassignment. We now modify that order and direct the district court to enter written findings regarding the factual issues as they existed at the time the injunction issued. (See order for issues.) We request, as before, that these findings be made as soon as possible, but no later than 7/26/90.
07/25/90	District Court enters findings of fact as to the current delays in caseworker assignment and reassignment.
10/29/90	Filed opinion of the U.S. Court of Appeals by Judge Cummings. AFFIRMED Cummings, Eschbach, dissenting, Manion.
10/29/90	Order: Final judgment, AFFIRMED.
11/13/90	Filed petition for rehearing with suggestion for en banc by defendants.

DATE	PROCEEDINGS
12/04/90	Filed answer of Amber B., Brandon W., Willie M., Myron C., Algienan G., Claude F., Sarah B., Artist M., to petition for rehearing and suggestion of rehearing en banc.
12/20/90	Order: Petition for rehearing with suggestion for rehearing en banc is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARTIST M., SARAH B., CLAUDE F., ALGIENAN G., MYRON C., WILLIE M., BRANDON W., and AMBER B., individually and on behalf of all other similarly situated individuals, by their next friend PATRICK T. MURPHY, Public Guardian of Cook County,	)	
Plaintiffs,	)	No. 88 C 10503
v.	)	
GORDON JOHNSON, Director Illinois Department of Children and Family Services and GARY T. MORGAN, Guardianship Administrator, Illinois Department of Children and Family Services,	)	Judge Shadur
Defendants.	)	

INTRODUCTORY STATEMENT

1. This case is a civil rights class action for declaratory and injunctive relief pursuant to the Due Process Clause of the United States Constitution, the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. Secs. 620-629, 670-679a (1983) (the "Adoption Assistance Act"), 42 U.S.C. Secs. 1983 and 1988, and 28 U.S.C. Secs. 1331, 1343, 2201 and 2202.

2. Named plaintiffs, Artist M., Sarah B., Claude F., Algienan G., Douglas S., Myron C., Willie M., Brandon W., and Amber B. bring this action on behalf of the class

of children who are or will be placed in the custody or under the supervision of the Illinois Department of Children and Family Services ("DCFS") in the course of an abuse, neglect, or dependency proceeding in the Juvenile Division of the Circuit Court of Cook County, Illinois ("Juvenile Court"). Plaintiffs attack defendants' policy and practice of failing to assign caseworkers in a timely manner.

3. Plaintiffs come into DCFS' custody or under DCFS' supervision because their parents abuse or neglect them or because of their parents' mental or physical disabilities. Some plaintiffs remain in their parents' homes or are placed in private homes under DCFS supervision. DCFS has custody of the other plaintiffs and places them in shelters, group homes, residential institutions, foster homes, and psychiatric hospitals.

4. DCFS receives federal funds under the Adoption Assistance Act. As a condition of receiving these funds, DCFS is required to make reasonable efforts to prevent the removal of children from their families; to make reasonable efforts to facilitate reunification of families when removal has occurred; to notify Juvenile Court or appropriate law enforcement agencies when a child is neglected, abused, or exploited in placement; and to develop case plans and a case review system to ensure that each child in placement is provided appropriate services. 42 U.S.C. Secs. 671(a)(9), (15), 675(1), 675(5).

5. DCFS attempts to satisfy these requirements by assigning a caseworker to each child and her family. The

caseworker is responsible for delivering appropriate services to them and for monitoring the home or other placement to protect the plaintiff.

6. Defendants, however, have a policy and practice of failing to assign a caseworker until four to six weeks after the Juvenile Court proceeding commences.

7. Defendants fail to identify and deliver necessary services during the first weeks of their involvement in plaintiffs' cases. Defendants are aware that this early stage is a critical time for family reunification, family stabilization, and adjustment to foster care or other placements.

8. In addition, defendants have a policy and practice of failing to reassign cases immediately when caseworkers are absent from their caseloads for significant periods of time. Hundreds of cases are without caseworkers for a variety of reasons, including termination, medical leave, and reassignment. As a result, many plaintiffs are without a caseworker for extended periods of time. In one case, for example, a caseworker's entire caseload was uncovered for eight months.

9. By failing to assign a new caseworker immediately when a child's previous caseworker is first withdrawn or absent from her case, DCFS fails to ensure that services will be delivered with continuity, to assess whether new services are necessary for the child and her family when conditions change, and to monitor the child's safety.

10. Defendants have violated their obligations to the plaintiffs under the Adoption Assistance Act to make

reasonable efforts to prevent or eliminate the need for their removal from their homes; to make reasonable efforts to facilitate family reunification when removal has occurred; to notify Juvenile Court or appropriate law enforcement agencies when a child is neglected, abused, or exploited in placement; to provide an appropriate case plan for each of them; and to provide a meaningful case review system.

JURISDICTION

11. This court has jurisdiction over this case pursuant to 28 U.S.C. Secs. 1331, 1343, 2201, and 2202. Venue is proper in this judicial district pursuant to 28 U.S.C. Sec. 1391, because the acts described herein took place within the Northern District of Illinois.

12. Plaintiffs, Artist M., Sarah B., Claude F., Algienan G., Douglas S., Myron C., Willie M., Brandon W., and Amber B. are minors who are under the care and supervision of DCFS. They are the class representatives of Class A. Douglas S., Myron C., Willie M., Brandon W., and Amber B. also represent Class B.

13. Gordon Johnson ("Johnson"), Director of DCFS, is sued individually and in his official capacity. He is responsible for developing, implementing, and monitoring the programs, policies and practices of DCFS, which is the agency mandated by Illinois law to provide family stabilization, reunification, foster care, adoption, and other services to the plaintiffs and their families. Ill. Rev. Stat. ch. 23, Secs. 5001-5005. Johnson is responsible for ensuring that DCFS' practices and policies comply with the law.

14. Gary T. Morgan ("Morgan"), the Guardianship Administrator of DCFS, is sued in his individual and official capacities. Morgan is the person named temporary custodian or guardian of the person of a child by the Juvenile Court when a child is placed with DCFS. Morgan is responsible for providing adequate services to these children.

CLASS ALLEGATIONS

15. The named plaintiffs bring this action, on their own behalf and on behalf of all others similarly situated, pursuant to Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The plaintiff Class A includes children (i) who are or will be named respondents in petitions filed in the Juvenile Court alleging that they are abused, neglected, or dependent; (ii) who, in the course of such proceedings, are or will be placed in DCFS' custody or are or will be returned home or placed in private homes under the supervision of DCFS; and (iii) who are now or will be without a caseworker because of the practices complained of herein.

16. Class A is so numerous that joinder of all members is impracticable. There are approximately 1,000 children in the class.

17. Questions of law and fact common to the members of the class predominate over any questions affecting only individual members of the class. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

18. The claims of the named plaintiffs are typical of the claims of the class.

19. The named plaintiffs will fairly and adequately protect the interests of the class. They have no interests antagonistic to the class and seek relief which will benefit all members of the class. Plaintiffs are represented by the Cook County Public Guardian. The Public Guardian is the court-appointed attorney and Guardian Ad Litem of each of the plaintiffs and, by virtue of an order of the Circuit Court of Cook County, has been or will be appointed attorney and Guardian Ad Litem for each class member. The Public Guardian is experienced in civil rights litigation.

20. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to the individual members of the class.

21. The defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive and declaratory relief with respect to the class as a whole.

22. Plaintiff Class B is a subclass of Class A. It includes children (i) who are or will be named respondents in petitions filed in the Juvenile Court, alleging they are abused, neglected, or dependent; (ii) who, in the course of such proceedings, are or will be placed in DCFS' custody; and (iii) who are now or will be without a caseworker because of the practices complained of herein.

23. Class B is so numerous that joinder of all members is impracticable. There are approximately 300 children in the class.

24. Questions of law and fact common to the members of the class predominate over any questions affecting only individual members of the class. A c'ass action is superior to other available methods for the fair and efficient adjudication of the controversy.

25. The claims of the named plaintiffs are typical of the claims of Class B.

26. The named plaintiffs will fairly and adequately protect the interests of the class. They have no interests antagonistic to the class and seek relief which will benefit all members of the class. Plaintiffs are represented by the Cook County Public Guardian. The Public Guardian is the court-appointed attorney and Guardian Ad Litem of each of the plaintiffs and, by virtue of an order of the Circuit Court of Cook County, has been or will be appointed attorney and Guardian Ad Litem for each class member. The Public Guardian is experienced in civil rights litigation.

27. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to the individual members of the class.

28. The defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive and declaratory relief with respect to the class as a whole.

STATEMENT OF FACTS

29. The Division of Child Protection ("DCP"), a division of DCFS, investigates complaints of alleged child abuse, neglect, or dependency.

30. If the DCP investigation reveals credible evidence of abuse, neglect, or dependency, the Cook County State's Attorney may file a petition in Juvenile Court.

31. If the Juvenile Court determines that there is probable cause to believe that the minor is abused, neglected, or dependent, it will either (a) place the child in the temporary custody of DCFS; (b) place the child in the temporary custody of another individual, usually a relative, under DCFS supervision; or (c) return the child to her parents or guardians under a protective order and under DCFS supervision. Ill. Rev. Stat. ch. 37, Secs. 802-10, 802-25 (1988).

32. DCP investigators rarely provide any services to children and their families other than the initial emergency placement, if necessary. Instead, DCP transfers the case to one of four DCFS area offices in Cook County for the assignment of a caseworker.

33. In most cases, DCFS does not assign a caseworker to a child's case until at least four to six weeks after Juvenile Court places the child in DCFS' temporary custody or under its supervision. Consequently, the plaintiffs and their families receive no social services during this crucial period.

34. Children in DCFS' custody receive little, if any, assistance from DCFS to help them adjust to the traumatic experiences they undergo. These children, who are

removed from their family homes and placed in shelters, foster homes, group homes, residential facilities, and psychiatric hospitals, usually cannot go to school, see their families, or receive medical care or counseling until a follow-up worker is assigned.

35. These children's families, often equally traumatized, receive little, if any, assistance from DCFS to help them remedy the conditions which led to the removal of their children. Often during this time, parents have no idea where their children are.

36. Children who remain home or are returned home to their families under a protective order receive just as little assistance from DCFS during this "caseworker gap." Since no DCFS caseworker is assigned to the case, no one monitors the condition of the home during this time. Consequently, the protection provided by the order is illusory, and plaintiffs are unnecessarily subjected to the risk of additional abuse or neglect, which may necessitate their removal from the home.

37. Likewise, children who are placed in the custody of a relative or other private individual are without DCFS supervision and services when no caseworker is assigned.

38. Once a caseworker is assigned to a particular case, she does not remain permanently assigned to that case. Caseworkers frequently take leaves of absence, resign, or are reassigned. As a result, few, if any, of the plaintiffs are serviced by the same caseworker from start to finish.

39. If a caseworker takes a leave, resigns or is reassigned, a child does not receive a replacement caseworker immediately. In fact, a child may go months without a caseworker because of DCFS' failure to replace previously assigned caseworkers.

NAMED PLAINTIFFS

40. Artist M. was born on May 11, 1988 with cocaine in his system. On July 7, 1988, the Juvenile Court entered a protective order upon Artist's mother. Artist's case was originally assigned to a DCFS worker from the Harvey office. It was transferred to the South Area Office in September 1988. The case has been unassigned since then. During this time, DCFS has provided no one to monitor Artist's safety or to determine whether necessary services are being provided.

41. In November 1988, DCFS investigated a report that the father of Sarah B., age thirteen, Judith B., age eleven, Avram B., age nine, and Rachael B., age six, had seriously beaten Avram. Sarah told the investigator that their father had hit Avram in the face so hard that he could not go to school the next day. She also told the worker that her father had coached all the children as to what they should say to DCFS. When the DCFS investigator first came to the home, the father denied access. On November 16, 1988, the Juvenile Court entered a protective order on the children's parents. The order prohibits the use of excessive corporal punishment and requires the parents to participate in counseling with the children. No worker has been assigned to the case. DCFS has

provided no one to monitor the home or to identify and obtain appropriate services.

42. Claude F. was born on November 9, 1988 with cocaine in his system. When he was born, he was suffering withdrawal from cocaine. He also tested positive for the HIV antibodies. Claude's mother admitted that during her pregnancy, she had used heroin, marijuana, and cocaine. Claude's condition required that he be on an apnea monitor. On November 18, 1988, the Juvenile Court entered a protective order upon Claude's mother which required that she attend a substance abuse program, that she submit to weekly urine tests, and that she take Claude to all necessary medical appointments. No caseworker has been assigned to Claude's case. DCFS has provided no one to monitor the home or to identify and obtain appropriate services.

43. In October 1988, DCFS investigated a report that Algienan G., age ten, Samuel G., age eight, and Stewart G., age two, had been left with their aunt by their mother without a care plan and that their mother used drugs. The Juvenile Court appointed the children's aunt temporary custodian of the children on October 28, 1988. That aunt's home is not large enough for the three children. Although she requires financial assistance for the care of the children, she has received none. Initially, the children's mother gave their aunt her public aid money. However, after the aunt was appointed custodian, the mother's aid was cut. The children's aunt is struggling to provide for them. No DCFS worker has been assigned to the case. DCFS has provided no one to monitor the home or to identify and obtain appropriate services.

44. Douglas S. was born on December 21, 1984. In September 1988, DCFS investigated a report that Douglas' mother was using tranquilizers, cocaine, and marijuana and that when a fire broke out in her apartment, she slept through the alarm. The investigation also revealed that Douglas had marks on his cheek and buttocks which his mother had inflicted, and that his mother had failed to seek medical attention for his impetigo. The DCFS investigator who took the reports described Douglas' case as a "high risk." The Juvenile Court appointed DCFS temporary custodian of Douglas on September 20, 1988. Douglas' case is not assigned to a caseworker. DCFS has provided no one to monitor the home or to identify and obtain appropriate services.

45. In September 1988, DCFS received a report that Myron C., age eleven, and Keisha C., age one, had been locked in their apartment with no means of escape on the evening of September 16, 1988. That evening the children's mother was arrested for prostitution. The Juvenile Court appointed DCFS temporary custodian of the children on November 9, 1988. DCFS assigned an interim services worker who submitted a social investigation report for the Juvenile Court on October 7, 1988. Since October 7, 1988, no worker has been assigned to the children's case. DCFS has provided no one to monitor the home or to identify and obtain appropriate services.

46. Willie M., age eleven, Latonya M., age eight, Erick M., age six, came to DCFS' attention in September 1988 when their grandmother reported that their mother abused cocaine and that she frequently left the children for days. The Juvenile Court appointed DCFS custodian

of the children on September 6, 1988. The case was initially assigned to an interim services worker. On November 16, 1988, the case was transferred to DCFS' South Area Office. It has been unassigned since then. A representative of DCFS informed the Juvenile Court on December 8, 1988 that the case was lost. Since then, DCFS has provided no one to monitor the children's safety or determine whether necessary services are being provided.

47. Brandon W., age eight, Jariotta M., age five, Parish W., age four, and Eugenia W., age two, are all in DCFS custody as a result of neglect by their mother. DCFS has been involved in the family since 1984 and it has had custody of the older children since 1986. During its involvement with the family, DCFS has assigned various workers to the case, the most recent being Aida Guarderas. According to DCFS' records, Ms. Guarderas remains the caseworker for the children. However, Ms. Guarderas has not been assigned to the DCFS unit handling the family since September 1988. As a result, the dispositional hearing scheduled for September 7, 1988 has had to be continued twice and is now set for February 23, 1989. Since September, DCFS has provided no one to monitor the children's safety or determine whether necessary services are being provided.

48. Amber B., age sixteen months, received severe burns and bruises in her home and was diagnosed as failure to thrive. On October 4, 1988, DCFS took temporary custody. Her three siblings remained in the home with their mother and grandmother under a protective order. An interim service worker was not assigned to the case until November 2, 1988. This worker saw the family

once that week. As of December 14, 1988, no DCFS caseworker was assigned to the case. During that time, DCFS provided no one to monitor the home or to identify and obtain necessary services.

49. The problems presented by the named plaintiffs are typical of the problems faced by the plaintiffs generally as a result of DCFS' failure to promptly assign and replace caseworkers.

50. As a result of the delay in initially assigning and later replacing caseworkers, plaintiffs who are removed from their homes remain in placement longer than necessary and are unable to visit their families, to receive therapy, to attend school on a regular basis, to receive medical treatment, or to receive any other reunification services or services to address their needs.

51. Plaintiffs who are removed from their homes are placed in foster homes and institutions without anyone to monitor their safety, despite the fact that many children in DCFS' custody are abused or neglected while in DCFS' custody.

52. Plaintiffs placed in DCFS' custody lack meaningful case plans and a case review system, which are specifically intended to ensure that they receive appropriate services.

53. As a result of the delay in initially assigning and later replacing caseworkers, DCFS fails to monitor adequately those plaintiffs who are returned home under DCFS supervision. Consequently, these children are without services necessary to address their needs and the needs of their families and are unnecessarily at risk of

additional incidents of abuse or neglect, which may necessitate their removal from the home.

OTHER ALLEGATIONS

54. Keyandra H. was born on October 10, 1988 with cocaine in her system. On November 9, 1988, the Juvenile Court entered a protective order on Keyandra's mother requiring that she refrain from using illegal drugs and that she attend drug counseling. As of December 5, 1988, Keyandra's case has not been assigned to a worker. DCFS had provided no one to monitor the home or to identify and obtain appropriate services.

55. Jessica S. was born on April 8, 1980. In October 1988, DCFS investigated a report that Jessica's mother had inflicted excessive corporal punishment upon her. At the time DCFS investigated, Jessica's buttocks was bruised. Jessica stated that her mother had caused the bruises and that at times her mother had inflicted extreme bruises. This report was the fifth time that DCFS had investigated Jessica's mother for child abuse. The Juvenile Court entered a protective order upon Jessica's mother requiring her to attend counseling and to refrain from using corporal punishment on Jessica. No case-worker has been assigned to Jessica's case. DCFS had provided no one to monitor the home or to identify and obtain appropriate services.

56. In November 1988, DCFS investigated a report that Walter L., age twelve, Marquess L., age four, and Tyrice L. and Parice L., both age two, had been left alone by their mother, whose whereabouts were unknown. On November 22, 1988, the Juvenile Court appointed DCFS

temporary custodian of the children. The children were placed in a foster home. Walter has been out of school for at least two weeks. Walter wants to live with his grandmother. Although his grandmother may be an appropriate foster parent for the children, the move could not be facilitated until a caseworker had been assigned. A caseworker was not assigned until December 14, 1988. DCFS had provided no one to monitor the home or to identify and obtain appropriate services.

57. In September 1988, DCFS investigated a report that Stacy A., age sixteen, and Willie A., age seventeen, were dependent due to their father's disability. Their mother had died, and their father had pancreatic disease and could not care for the children. The Juvenile Court appointed DCFS custodian of the children. DCFS had provided no one to monitor the home or to identify and obtain appropriate services.

58. Jonathon H. was born on March 19, 1984. In November 1988, DCFS received a report that his mother had left him with a friend without a care plan. On November 9, 1988, the Juvenile Court placed Jonathon in his father's custody under a protective order. No caseworker has been assigned to Jonathon's case. DCFS had provided no one to monitor the home or to identify and obtain appropriate services.

59. Ginger B. was born on July 3, 1988. In November 1988, DCFS investigated a report that Ginger's mother had left her alone in the home and that she had fallen from a chair to the floor. On November 4, 1988, the Juvenile Court appointed DCFS custodian of Ginger. On November 14, 1988, the Juvenile Court returned custody

of Ginger to her mother under a protective order. No caseworker has been assigned to Ginger's case. DCFS had provided no one to monitor the home or to identify and obtain appropriate services.

60. Dameon L. was born on October 4, 1988 with cocaine in his urine. On November 9, 1988, the Juvenile Court entered a protective order on Dameon's mother requiring her to undergo a drug evaluation and to maintain a permanent suitable residence. No caseworker has been assigned to Dameon's case. DCFS had provided no one to monitor the home or to identify and obtain appropriate services.

61. Robert D. was born on November 15, 1988. He was found in a senior citizen's home two or three hours after his birth. On November 16, 1988, the Juvenile Court appointed DCFS temporary custodian of Robert. No worker has been assigned to Robert's case. DCFS had provided no one to monitor him in his placement or to identify and obtain appropriate services.

62. Denise V. was born on December 17, 1981. In August 1988, Denise was discovered to be severely malnourished. At that time, she had been out of school for forty-nine consecutive days. On August 18, 1988, the Juvenile Court entered a protective order on Denise's mother. The order required, among other things, that Denise's mother provide Denise with adequate food. No worker was assigned to Denise's case until November 29, 1988 – over three months after the protective order had been entered, and less than three months before the protective order was to expire. DCFS had provided no one to

monitor the home or to identify and obtain necessary services.

63. Crystal B. and her sisters Holly D. and Melita D. lived with their father in June 1988. Their father had a drinking problem. He spent money that was for the children's food, and the children were often left hungry. At that time Crystal, who was then sixteen years old, was pregnant. In June 1988, the Juvenile Court entered a protective order on the girls' father. From June until October 1988, no caseworker was assigned to their case. DCFS had provided no one to monitor the home or to identify and obtain necessary services.

64. On October 21, 1988, the Juvenile Court appointed DCFS guardian of Johnnel S., who is six years old. DCFS placed Johnnel with Bea Ella Hall, a foster mother. Johnnel's case was not assigned to a worker until November 28, 1988. In the meantime, Johnnel was not enrolled in school, and he received no visits with family members. Ms. Hall had no idea why Johnnel was placed with her or what services he required. DCFS had provided no one to monitor the home or to identify and obtain necessary services.

65. Tyronda P., age seven, Ebony P., age five, and LaShawndra P., age one, came to the attention of DCFS in August 1988 when a young man living in their home murdered their three year old sister, Ryan. On August 5, 1988, the Juvenile Court imposed a six month protective order upon their mother which required that she allow no contact between the children and the murderer and that she and the children participate in counseling. The children's case was unassigned until at least December 9,

1988. DCFS had provided no one to monitor the home or to identify and obtain necessary services.

66. Eric H. was born on November 6, 1988 with cocaine in his system. On February 11, 1988, the Juvenile Court imposed a protective order upon his mother which required his mother to take him to necessary medical appointments and to participate in drug screening and treatment. From at least as early as August 30, 1988 until at least November 14, 1988, the case was not reassigned while Eric's worker was on medical leave. Throughout that time, DCFS provided no one to monitor the home or the services provided to Eric's family.

67. Erick B. was born on April 23, 1986. In February 1988, DCFS investigated a report that Erick's mother was unable to care for him because of emotional problems. The Juvenile Court entered a nine month protective order on Erick's father on February 29, 1988. The order prohibited Erick's father from allowing Erick to see his mother without DCFS supervision and required Erick's father to attend parenting classes and refrain from using excessive corporal punishment. Erick's case was originally assigned to DCFS caseworker Tom Stabnicki. Mr. Stabnicki was on leave from DCFS from July 1988 until early December 1988. Throughout his absence, Erick's case was unassigned, and DCFS provided no one to monitor the home or to identify and obtain necessary services. On December 9, 1988, before Mr. Stabnicki had returned from leave and over the objection of the Public Guardian, the Juvenile Court vacated the protective order because it had expired and dismissed the case.

68. In December 1987, DCFS investigated a report that Jennifer F., age ten, and Michele D., age eight, had been sexually abused by Michele's father, who is Jennifer's stepfather. On December 29, 1987, the Juvenile Court appointed DCFS custodian of Jennifer, Michele, and their sister, Kimberly, age five. Their case was not assigned to a DCFS caseworker for over a month. During that time, DCFS provided no one to monitor the home or to obtain necessary services.

69. In June 1988, DCFS investigated a report that Katherine H., age eight, and William H., age eleven, had been subjected to sexual abuse by their father. On June 14, 1988, Juvenile Court appointed DCFS custodian of the two children. No DCFS caseworker was assigned to the case until August 1988. William's glasses were lost when he first came into custody. Both children required counseling. However, until a caseworker was assigned, William had no glasses and neither child received any counseling.

70. Harvey G. was born on July 29, 1988 addicted to cocaine and PCP. DCFS took temporary custody of Harvey on October 4, 1988 and placed him with his maternal grandmother. Harvey is on a monitor and has vision and hearing problems. The case was originally assigned to DCP worker Marilyn Pedro and remains officially assigned to Pedro as of December 12, 1988. DCFS states, however, that Ms. Pedro left employment there in August, 1988. During that time, DCFS provided no one to monitor the home or to obtain necessary services.

COUNT I

71. Plaintiffs in Class A incorporate and reallege paragraphs 1 through 70.

72. Defendants have violated the rights of the members of Class A under the Adoption Assistance Act in that defendants, as a result of their policy and practice of not assigning and replacing caseworkers promptly, have failed to make reasonable efforts (a) to prevent or eliminate the need for removing the plaintiffs from their homes, and (b) to facilitate reunification of the plaintiffs with their families when removal is initially required.

COUNT II

73. Plaintiffs incorporate and reallege paragraphs 1 through 70.

74. Defendants have violated the rights of the members of Class B under the Adoption Assistance Act in that defendants, as a result of their policy and practice of not assigning and replacing caseworkers promptly, have failed:

(a) to ensure that DCFS inform the Juvenile Court or the appropriate law enforcement agency of any abuse, neglect, or exploitation of the plaintiffs while in DCFS-subsidized placement;

(b) to develop and implement a meaningful case plan for each of the plaintiffs; and

(c) to develop and implement a meaningful case review system with respect to the plaintiffs.

COUNT III

75. Plaintiffs in Class B incorporate and reallege paragraphs 1 through 70.

76. Defendants have violated the rights of the members of Class B under the Due Process Clause of the United States Constitution in that defendants, as a result of their policy and practice of not assigning and replacing caseworkers promptly have denied plaintiffs in Class B adequate treatment in custody.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs, individually and on behalf of all other similarly situated individuals, pray that this court enter an order:

1. Declaring that defendants' policies and practices complained of herein violate the plaintiffs' rights under the Adoption Assistance Act and the Fourteenth Amendment of the United States Constitution;

2. Requiring defendants to develop a plan to ensure that DCFS assigns a caseworker capable of delivering family preservation, family reunification, placement, visitation, medical, counseling, educational, and other services to each of the plaintiffs and their families no later than twenty-four hours after the Juvenile Court places them in the temporary custody of DCFS or a private individual or returns them home under DCFS' supervision;

3. Requiring defendants to develop and implement a plan that will ensure that DCFS will provide such a

caseworker at all times to each of the plaintiffs and their families while their cases are pending in Juvenile Court;

4. Requiring defendants to notify the Office of the Public Guardian of the name of every plaintiff for whom no caseworker is assigned for a period of greater than twenty-four hours;

5. Awarding plaintiffs the reasonable costs and expenses incurred in the prosecution of this action, including, but not limited to attorneys' fees pursuant to 42 U.S.C. Sec. 1988; and

6. Granting such other or further relief as the Court deems just and proper.

Respectfully Submitted,

One of the Plaintiffs' Attorneys

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ARTIST M., *et al.*, Plaintiffs,	)	No. 88 C 10503
v.	)	
GORDON JOHNSON, *et al.*, Defendants.	)	Judge Shadur

On June 21, 1990 the Court of Appeals entered an order partially remanding this case to this Court for the entry of factual findings as to the current delays in case-worker assignment and reassignment (the "June 21 Order"). This Court promptly set a status hearing to schedule the proceedings necessary for that purpose. Because of certain questions identified by this Court in that status hearing, defendants (for convenience hereafter referred to collectively as "DCFS") returned to the Court of Appeals, and the June 21 Order was modified on June 27, 1990 by the "June 27 Order."[1] This Court then set for July 18 both (a) an evidentiary hearing and (b) the contemporaneous advance submission by the parties of proposed findings of fact and conclusions of law – that was the earliest date that the parties could do so, given the preparation that they required for those purposes.

In part this Court directed the parties to include in their evidentiary submissions the information that would facilitate this Court's recapitulation of the situation as of

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[1] Copies of the June 21 Order and June 27 Order are attached as Exhibits 1 and 2 to this memorandum opinion.

the March 2, 1990 date of entry of the preliminary injunction order now on appeal, and that would do so in the context of the record that had been before this Court reflecting the earlier situation at DCFS.[2] That would effectively enable this Court to provide the Court of Appeals with a brief motion picture rather than simply a still photograph, inasmuch as DCFS' perceived lack of progress under its own Reorganization Plan despite the passage of many months was the key motivating factor in this Court's decision to enter the March 2 injunction order.

Shortly before the scheduled July 18 hearing date the parties advised this Court that they had been able to reach stipulations as to a number of the facts that would obviate the need for a testimonial hearing, so that they would meet the July 18 date established by this Court with paper submissions rather than testimony. Both did so at the end of the July 18 working day.[3]

On July 20 DCFS moved to strike virtually all of plaintiffs' submission, setting that motion for hearing on July 24.[4] To the extent that DCFS' motion related to the

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[2] That requested presentation was viewed as helpful in directing this Court's attention to the specific record references to the before-and-after situations.

[3] Their Stipulations (cited here as "Stip. ¶ – ") are attached as Exhibit 3 to this memorandum opinion.

[4] That four-day gap (weekend included) conformed to this District Court's General Rule 12(e), which specifies two working days' prior notice by personal delivery of any motions to be presented in court. However, this Court frequently deals with matters on a more expedited basis where there is an

(Continued on following page)

proposed findings of fact ("Findings") tendered by plaintiffs, that criticism was indeed ironic: It essentially sought to object because plaintiffs' submission did deal, in an effective and informative way, with the background that was known to this Court when it rejected DCFS' purported implementation of its Reorganization Plan as having failed to deliver the results that it was supposed to accomplish, and thus as a failure to comply with the statutory "reasonable efforts" standard. And although DCFS' motion proposed to criticize plaintiffs as thus seeking to buttress their case before the Court of Appeals, in a number of vital areas DCFS' own Proposed Findings of Fact did exactly what DCFS' counsel were urging was improper on plaintiffs' part – for DCFS' submission also sought to argue its own case as a matter of advocacy.[5]

(Continued from previous page)

emergency or where timing is otherwise critical, and where the opponent does not urge any prejudice by reason of the accelerated schedule. It would seem that type of accelerated treatment should have been sought here, given the Court of Appeals' specified July 26 deadline.

[5] For example, DCFS Proposed Finding 3 unconvincingly sought to reduce the *stipulated* 19-day average delay in cases transferred from Interim Services Teams ("ISTs") to DCFS area offices at the end of the 30 to 45-day period of initial services provided by the IST (Stip. ¶¶19, 3). DCFS would have this Court find that the 19-day delay somehow becomes a 5-day delay merely because the transferor IST technically (that is, on paper) retains responsibility for a case for 14 days after the file is transferred. From the prior hearings conducted by this Court and from other evidentiary submissions, such theoretical wholly-on-paper responsibilities do not at all serve the goal of actual caseworker assignments to people who are physically able to perform the various caseworker responsibilities. This Court has therefore rejected DCFS' position as at war with the facts.

Accordingly DCFS' motion to strike much of plaintiffs' submission has been denied. This Court does agree that no Conclusions of Law of the type suggested by plaintiffs are called for – those were expressly included in this Court's preliminary injunction order – and so plaintiffs' recommended legal conclusions have not been taken into account here.

One last point should be addressed before turning to the Findings themselves. This Court has of course not gone forward with any proceedings in this action during the pendency before the Court of Appeals of the interlocutory appeal from the March 2 preliminary injunction – but that does not relieve this Court of its responsibility to be alert to developments potentially affecting the case. Thus this Court had also been fully aware of, and had been monitoring, the pendency of *Wilder v. Virginia Hospital Association*, 110 S.Ct. 2510, 2517-23 (1990).[6] It accordingly reviewed the *Wilder* decision as soon as it was handed down.

If this Court had viewed that decision as in any respect destroying the underpinnings of this Court's determination of plaintiffs' reasonable likelihood of success on the merits in *this* case – that is, as negating the existence of plaintiffs' private cause of action here – it

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[6] That awareness of *Wilder* was not primarily stimulated by this case. As it happened, this Court had late last year, based on the Supreme Court's having accepted review in *Wilder*, deferred ruling on a motion in an entirely different case on its calendar – one that posed the identical substantive question of an enforceable private cause of action under the specific statute involved in *Wilder* (the Boren Amendment to the Medicaid Act).

would have considered that its judicial responsibility called for requesting a remand from the Court of Appeals to enable this Court to vacate the preliminary injunction because of that supervening development of law.[7] Potential mootness would always seem an appropriate consideration under such circumstances.

Accordingly this Court has indeed considered the effect of *Wilder* on its preliminary injunction decision here. It has determined that the Supreme Court's upholding of the Boren Amendment's "reasonable rates" standard as giving rise to private enforceable rights

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[7] Indeed that is essentially what this Court did in *United States v. Williams*, 877 F.2d 516 (7th Cir. 1989). There this Court had, during the course of the criminal trial, rejected the proposed entrapment defense of codefendant Tedric Beverly ("Beverly") based on the then-established principles consistently announced by our Court of Appeals' decisions. After Beverly had been convicted by the jury and sentenced by this Court and had then taken an appeal, the United States Supreme Court reversed our Court of Appeals in *United States v. Mathews*, 108 S.Ct. 883 (1988), which involved the same entrapment question. This Court therefore requested the Court of Appeals to remand the case to permit this Court to determine whether adherence to the supervening Supreme Court decision in *Mathews* would have required it to submit defendant's entrapment defense to the jury (as this Court had refused to do at trial) – see this Court's opinion in *United States v. Beverly*, 699 F. Supp. 1256, 1258 (N.D. Ill. 1988). Such a limited remand was ordered by the Court of Appeals, this Court made the necessary determination and returned the case to the Court of Appeals, and the conviction was then affirmed at 877 F.2d 516.

under Section 1983[8] strongly reinforces, rather than casting into any doubt, this Court's decision as to the "reasonable efforts" standard under the statute at issue here (and see the opinion to the same effect by this Court's colleague Honorable William Hart in *Norman v. Johnson*, 1990 U.S. Dist. LEXIS 6181, at 7-12 (N.D. Ill.), issued after this Court's opinion here and before the Supreme Court's decision in *Wilder*). This Court will therefore not request any further remand to enable it to consider vacating the preliminary injunction order now on appeal.

This opinion now turns to the Findings. As was true during the proceedings that took place before the entry of the March 2 preliminary injunction, this Court has found DCFS' position largely unpersuasive and that presented by plaintiffs largely persuasive. These Findings therefore draw largely on plaintiffs' submissions.

Findings of Fact

Initiation of Juvenile Court Cases

1. As to each member of the plaintiff classes, DCFS has filed or will file a petition for adjudication of wardship ("petition") in the Circuit Court of Cook County, Juvenile Division ("Juvenile Court"), alleging that the

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[8] In addition to its rejection of the argument that "the obligation imposed by the [Boren] Amendment is too 'vague and amorphous' to be judicially enforceable" (*Wilder*, 110 S.Ct. at 2522), the Supreme Court characterized as an "objective benchmark" a standard that called on a court to review whether the State had "ensur[ed] 'reasonable access' to eligible participants" (*id.* at 2523).

child is abused, neglected or dependent. 1-17-89 Tr. 26, 274.

2. DCFS' filing of a petition is based upon an investigation conducted by its Office of Child Protection ("DCP"), one of whose investigators is assigned to each case. 1-17-89 Tr. 225, 275, 276. Such investigators do not themselves provide or arrange for any services for children or their families. P. Ex. 29: Denton Dep. 9-10.

3. When DCFS files the petition, it requests an award of temporary custody or the entry of a protective order. If it seeks the former, the temporary custody hearing usually occurs on the same day the petition is filed; but if DCFS recommends a protective order, the first court date is usually scheduled at some future date (at varying intervals) after DCFS files the petition. P. Ex. 29: Benson Dep. 19. Even where DCFS may seek temporary custody of the child, the child and the parents have a right to contest that request. Thus some of those cases, as well as those in which DCFS recommends a protective order, result in the Juvenile Court's referring the child to his or her parents' custody under a protective order. 1-17-89 Tr. 27-28. Conversely, when the Juvenile Court awards temporary custody, it appoints Gary T. Morgan or another person as custodian of the child.

Vital Role of the Caseworker[9]

4. When temporary custody is taken, a DCFS caseworker must be assigned in order to maintain the child's family ties, work toward reunification and ensure the child's well-being. To those ends the caseworker must search for relatives qualified to care for the child or locate a suitable placement; arrange appropriate counseling; complete school transfers where appropriate so the child's education is not interrupted; arrange family visitation; provide appropriate medical care; and generally assure the child's safety. 1-17-89 Tr. 247-58; P. Ex. 29: Mayberry-Dunn Dep. 15-16, Williams Dep. 22-27. In temporary custody cases the caseworker is also responsible for developing a written, individualized case plan and advising the Juvenile Court of the condition of the child and the family. 1-17-89 Tr. 31; 1-19-89 Tr. 786; P. Ex. 29: Mayberry-Dunn Dep. 15-16, Williams Dep. 22-27.

5. If no caseworker is assigned to the case, the child is usually dropped off at a placement without any information about his or her case, such as the nature of the abuse or neglect and the names of family members. Without that critical information, neither reunification services

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[9] DCFS' proposed Findings seek to denigrate the importance of caseworkers as mere "case managers, who arrange for the provision of services by others." But that is both (1) a mistaken emphasis on the mechanics rather than the human values involved in the relationship and (2) all of a piece with DCFS' consistent substitution of a theoretical paper structure of "responsibility" for the existence of a live person with actual hands-on responsibility for assuring that the needed services are in fact provided (see n.5, Finding 19 & n.10 and Finding 22.)

such as visitation nor other vital child welfare services can begin. 1-17-89 Tr. 82; 1-18-89 Tr. 351-56.

6. In protective order cases the caseworker must secure services to preserve the family: individual or family counseling to ease or eliminate the crisis that led to the child's mistreatment; homemaker and housekeeping services so that the conditions of the home will not require the child's removal; substance abuse programs to enable parents to attend to their children's needs; help in obtaining food, shelter and medical care; and monitoring of the child's safety at home. 1-17-89 Tr. 168, 183; P. Ex. 29: Mayberry-Dunn Dep. 15-16.

7. DCFS may also contract with a private agency to provide child welfare services in both protective order and custody cases. Significantly, DCFS' own standards confirm the importance of personal contact by the assigned worker – it requires a private agency to see the child within 24 hours of receipt of the case. Plaintiffs' January 19, 1990 Response to Defendants' Report to the Court ("P. Resp.") Ex. 1, Int. 5(h).

8. When a case is transferred to a private agency, DCFS and the private agency share the responsibility for delivering services, so that the private agency delivers services directly while DCFS has a supervisory and monitoring role. 1-19-89 Tr. 699; P. Ex. 29: Mayberry-Dunn Dep. 39. DCFS caseworkers are jointly responsible with the private agency for preparing a case plan and providing an administrative case review, and they retain ultimate responsibility for all facets of the case. P. Ex. 29:

Williams Dep. 26. DCFS' caseworker also remains responsible for ascertaining whether there are appropriate relatives with whom to place a child. 1-17-89 Tr. 84. Certain services (such as psychiatric hospitalization for a suicidal child) may not be provided by a private agency, and the DCFS caseworker remains primarily responsible for obtaining or providing the consent for such services. 1-18-89 Tr. 359. DCFS' caseworker may also be required to authorize familial visits. 1-18-89 Tr. 363, 365. DCFS' caseworker is also responsible for planning for long-term care of children in short-term private agency placements, a responsibility that includes authorizing a psychological evaluation, which is essential to the long-term placement of an adolescent. 1-18-89 Tr. 353.

9. Unless and until DCFS has assigned a caseworker, no services can be or are in fact provided to plaintiffs or their families. P. Ex. 29: Mayberry-Dunn Dep. 35, Denton Dep. 29. For example, a young child in DCFS' custody may be denied visits with her parents or siblings for several weeks (1-17-89 Tr. 89; 1-18-89 Tr. 342, 355-56, 363-65); be left in an inappropriate placement such as a shelter, even when appropriate relatives are interested in caring for her (1-17-89 Tr. 84-85); be denied sex abuse treatment, grief counseling or psychiatric care (1-17-89 Tr. 100, 111; 1-18-89 Tr. 359); be unable to attend school (1-18-89 Tr. 341-42); or be in DCFS custody without any case plan (Benson Exs. 1 and 5) – all while awaiting the assignment of a caseworker.

10. DCFS' failure to provide caseworker-initiated services at early stages of its custody of plaintiffs is particularly harmful. 1-18-89 Tr. 367, 499-500; 1-19-89 Tr. 636; P. Resp. Ex. 2. Because family members are the most

motivated during a time of crisis, immediate intervention is essential. 1-18-89 Tr. 389. Relatedly, the likelihood that children whom DCFS separates from their families will return home is directly related to the speed with which they receive reunification services. 1-18-89 Tr. 500; P. Resp. Ex. 3. Thus the greater the delay in providing such services during this critical period, the more likely it is that the child will never return home, and the goal of family reunification becomes more remote and less attainable. 1-17-89 Tr. 227; 1-18-89 Tr. 365, 367; 1-19-89 Tr. 629.

11. Children who reside at home under DCFS' supervision are also denied family preservation services and protection when no caseworker is assigned. 1-17-89 Tr. 183. For example, without a caseworker a child who had come under DCFS' supervision because her parent failed to provide adequate food went hungry again and had to leave her mother's home (1-17-89 Tr. 129-31); a parent who had been ordered to obtain drug treatment by the Juvenile Court and was willing to do so in order for her children to remain with her had no assistance from a caseworker in locating and enrolling in a drug treatment program (1-18-89 Tr. 402-06); and a child who was without an assigned caseworker to make home visits was further abused by his father and had to be removed from his father's custody (1-17-89 Tr. 131-38).

12. When children remain at home, DCFS' failure to provide family preservation services quickly places them at risk and often results in their removal from home. 1-17-89 Tr. 129-37; 1-18-89 Tr. 512; 1-19-89 Tr. 629; P. Ex. 29: Johnson Dep. 29-30. Defendant Gordon Johnson

testified (1-19-89 Tr. 630):

> [W]e didn't have a strong preventive effort at the front end of the system to try to keep children, as much as possible, at home with all the possibility of good services.

Without such an effort, the child's situation often deteriorates and DCFS must remove the child from her home. 1-17-89 Tr. 133-38; 1-18-89 Tr. 447, 512.

DCFS' Caseworker Assignment Practices at the Time of the Hearing

13. As of December 31, 1988 DCFS regularly delayed the assignment of cases to caseworkers capable of initiating child welfare services to the plaintiffs and their families, both in protective order and in temporary custody cases. In most cases DCFS did not assign a caseworker until at least two weeks after the first Juvenile Court date. In a large number of cases the delays lasted 30-45 days after plaintiffs' cases were initiated in Juvenile Court, with some delays in excess of 45 days. Stip. ¶1.

14. Delays described in Finding 13 occurred in cases sent from DCP to one of the ISTs. ISTs handled new temporary custody cases except sex-abuse cases. Other court cases – protective order and sex-abuse cases – were sent from DCP directly to one of DCFS' area offices. There were similar 30-45 day delays in those cases. Stip. ¶2.

15. In a large number of cases, even after caseworkers were assigned children lost the benefit of the assignment when their cases later became unassigned. That happened at various stages in a variety of ways. In

cases initially sent to an IST, the caseworkers were assigned for only 30-45 days. Stip. ¶3. After the IST completed its tasks, each of its cases would be transferred to one of DCFS' four area offices. *Id.* There children were again often left for significant periods of time without a caseworker, and thus without family reunification and other child welfare services. 1-17-89 Tr. 33, 188; 1-19-89 Tr. 605-06, 680-81.

16. Similar gaps occurred when DCFS failed to reassign cases after caseworkers in DCFS' four area offices resigned, were terminated, transferred or took leaves of absence. 1-17-89 Tr. 32-33; 1-19-89 Tr. 685-89, 745; P. Exs. 23-25. Those gaps arose regularly as well, for DCFS caseworkers frequently transfer, take leaves of absence, are terminated or resign. Stip. ¶4. Children whose cases were previously assigned to those caseworkers generally went without a caseworker for 30 days after those absences began. Stip. ¶6. Moreover, some children's cases remained assigned to workers who had left DCFS months earlier. P. Ex. 23, 25.

17. Unassigned cases generally were a significant problem as of January 1989. At the end of September 1988 DCFS records reflected that there were over 200 cases in Cook County that had been unassigned for over 30 days. P. Group Ex. 28-0 at 2. At the end of November 1988 DCFS records showed that 320 cases in Cook County had been unassigned for over 30 days, that 83% of those had been unassigned for over 60 days and that 63 cases had been assigned for over 100 days. P. Group Ex. 28-R; P. Ex. 26. In November 1988 Mark Moses, the DCFS employee responsible for monitoring the unassigned caseworker problem, actually wrote, "[T]here are good reasons to

have those cases unassigned." Plaintiffs' Group Ex. 28-O. On December 13, 1988 the head of DCFS' Cook County operations wrote that unassigned cases in Cook County were on the rise. P. Group Ex. 28-P.

18. DCFS did nothing to expedite the assignment of caseworkers capable of delivering family preservation, family reunification and other services to children and their families. Delays described in the prior Findings were a direct result of DCFS' failure to require its personnel to assign cases promptly. P. Ex. 29: Benson Dep. 30-31. DCFS had no mechanism that systemically assured prompt caseworker assignment. 1-17-89 Tr. 241-42. For example, DCFS did not limit the time within which a supervisor assured prompt caseworker assignment. 1-17-89 Tr. 241-42. For example, DCFS did not limit the time within which a supervisor must assign a case. P. Ex. 29: Benson Dep. 30-31.

19. DCFS also failed to develop a policy or procedure for reassigning cases of caseworkers who are absent, irrespective of the reason, for substantial periods of time. 1-19-89 Tr. 685-89, 745; P. Group Ex. 28-H, J, N, O, R. In fact DCFS' witnesses testified that there was a "management decision" not to reassign cases of workers on leave and that DCFS had no procedure whatever regarding cases of workers on leave for a period up to five weeks. 1-19-89 Tr. 745; and see Stip. ¶¶5, 6. Often DCFS made paper assignments by assigning a caseworker in name only. 1-17-89 Tr. 190. Such paper assignments left the child without services, for in reality the child lacked a

caseworker.[10] 1-19-89 Tr. 688; 1-17-89 Tr. 110-11; Benson Ex. 5.

DCFS' Caseworker Assignment Practices: 1989-90

20. By July 1989 DCFS had implemented three of the four elements of its plan to remedy the caseworker assignment process:

(a) the Early Response Package, reducing the paperwork necessary to transfer a case from DCP investigators to the IST and follow-up caseworker teams (1-19-89 Tr. 606);

(b) the expansion of the IST program, designed to allow DCFS to assign all new custody cases to an IST before transferring them to an area office; and

(c) the Family First Initiative ("Family First"), designed to provide intensive services to children remaining at home with their parents.

D. Supp. Submission (August 4, 1989) at 29-32; Stip. ¶¶8, 9, 11 and 12. On July 16, 1989 the final element of DCFS' plans, the division of DCP into the same geographic areas as the area offices, was completed. Stip. ¶4.

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[10] At the risk of belaboring the point, this past pattern of behavior on DCFS' part ties directly into the lack of credibility of DCFS' argument referred to in n.5. It also reinforces the appropriateness of this Court's looking at DCFS' past performance (or more accurately its lack of performance) when this Court evaluated the situation at the time it entered the March 2 preliminary injunction order.

21. Despite the changes, significant delays persisted in assigning caseworkers at the outset of cases. For children whose cases were initiated in Juvenile Court in July 1989, DCFS took an average of 9.3 days between the initial court appearance and the assignment of an IST caseworker and 19.1 days between the transfer from the IST to the assignment of a follow-up caseworker. P. Resp. at 3.

22. IST caseworkers retain full responsibility for a case for 30 to 45 days. Stip. ¶3. After that initial period DCFS can extend the assignment of an IST caseworker for an additional two weeks, but during the extension the caseworker's role is limited to court appearances and to arranging placement changes. P. Resp. Ex. 1, Int. 3(k). IST does not retain responsibility for the remaining caseworker functions such as monitoring a child's safety or arranging parent-child visits.[11] Moreover, the practice of extending IST responsibility is not always followed. P. Supp. Submission (February 12, 1990) at 12 n.9.

23. As a result of DCFS' policies and practices, children whose cases were initially served by an IST were without a caseworker capable of delivering the full array of reunification and other child welfare services for an average of one month within the first two to three months. P. Resp. at 3. Those caseworker gaps occurred at a time crucial to the reunification of plaintiffs with their families. Id. Exs. 2, 3.

24. Neither the IST nor the Family First program functioned as planned. In July 1989 approximately one-

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[11] See n.5.

third of new custody cases went directly from DCP to area offices without IST intervention. P. Resp. at 6. In those cases DCFS failed to assign a caseworker until, on average, 10 days after the first Juvenile Court date. Id. at 6-7. As for Family First, children whose cases were initially assigned to that program experienced significant delays after the expiration of the two to three months during which Family First served the family before assignment of a caseworker at the area offices. 1-19-89 Tr. 602; P. Resp. Ex. 9.

25. DCFS' claims that 77% of July 1989 cases were assigned from DCP to IST in under 5 days were based on a log that IST maintained for new cases. P. Resp. Ex. 1, Int. 2(b). But that log did not include the date on which cases were really assigned *at* IST. Id. Ex. 4: Benson Dep. 28-29; Stip. ¶17. Instead the information contained in the log and the basis for DCFS' representations was merely the date that the early response package "was received at IST." Defendants' January 31, 1990 Reply to Plaintiffs' Response to Defendants' Reports to the Court ("D. Reply") at 14. DCFS had no record of when the cases were actually assigned to an IST caseworker capable of providing child welfare services to plaintiffs and their families. P. Resp. Ex. 4: Benson Dep. 17-18, 28-29.

26. DCFS' changes did not address the gaps created when caseworkers resigned, transferred, were fired or took a leave of absence. Stip. ¶25. Given the number of and frequency of transfers and the high turnover rate of DCFS caseworkers, DCFS' failure to attempt to deal with that problem was especially dangerous. Goad Ex. 9 at 1, 3; P. Group Ex. 28-O at 1; P. Ex. 29: Denton Dep. 22. If a

caseworker were absent for less than 30 days, the supervisor merely monitored the case without handling the everyday service needs of the family. D. Supp. Submission (August 4, 1989) at 36. When absences extended beyond 30 days, DCFS' policy and practice continued to permit supervisors to leave cases previously assigned to the absent caseworker unassigned for 30 or more days. Stip. ¶¶4-6, 25.

27. Cases that *were* reassigned during a caseworker's absence were reassigned en masse to a single caseworker, who by the nature and volume of the reassignments was not and could not be expected to provide services. P. Resp. Exs. 10, 11.

28. Even after implementation of DCFS' plans, its procedures failed to fix responsibility for assigning a caseworker promptly. DCFS assigned Mark Moses to monitor unassigned cases but did not require him to take action when he observed the existence of unassigned cases. P. Resp. Ex. 6, Moses Dep. Gloria Lewis, DCFS' Associate Deputy Director for Cook County Operations who supervises the administrators of the four area offices, received monthly reports listing unassigned cases. P. Resp. Ex. 7, Lewis Dep. Nonetheless, she played no role and had no responsibility in ensuring the assignment of those cases. *Id.* at 15, 47-49.

29. John Goad and Chris Benson, to whom DCFS entrusted the responsibility of closely monitoring compliance with the Early Response Package, reviewed DCFS' performance on only two occasions in all of 1989. John Goad Affidavit (January 31, 1990) ("Goad Aff.") at 3-4, attached to Defendants' Reply of the same date. DCFS

instead simply relied on its expectations (really its wishful thinking) that cases would be assigned. Defendants' Reply at 4, 14.

30. DCFS finally revised the IST logs in December 1989 to record the date on which a caseworker was actually assigned. Affidavit of Chris Benson (January 31, 1990) ("Benson Aff.") at 9, attached to Defendants' Reply; Stip. ¶18. DCFS then submitted December logs for one IST team to this Court. Benson Aff. Ex. F. Of the 20 cases that DCFS selected for the Court's review, only 9 were assigned in 5 days or less. *Id.* All the remaining cases were assigned only after significant delays, with several of them assigned 10 days or more after the first Juvenile Court date. *Id.*

31. On December 7, 1989 Goad wrote in an internal memorandum that the percentage of cases not routed to IST within 5 days had *increased* since July 1989, a trend he described as "disappoint[ing]." Goad Aff. Ex. B.

32. IST logs from January and February 1990 also demonstrated continuing delays in IST caseworker assignment. In January and February 1990 DCFS sent approximately 150 cases to IST for assignment of a caseworker. Stip. ¶21. In several cases IST logs did not contain adequate information to determine the date on which a caseworker was assigned. *Id.*

33. DCFS did not assign a caseworker within 5 days of the first Juvenile Court date in 56 of the remaining 146 cases sent to IST in January and February 1990. *Id.* DCFS thereby fell significantly short of the goal that it had established for itself: assignment of a caseworker within

three to five days. 1-17-89 Tr. 227, 149; Defendants' Proposed Findings of Facts and Conclusions of Law (January 30, 1989) at 44; Defendants' Supplemental Reply Regarding Defendants' Reports to the Court and in Opposition to Plaintiffs' Motion for Preliminary Injunction (February 12, 1990) at 3.

34. In February 1990 alone DCFS did not assign a caseworker within 5 days of the first court date in 40% of the cases sent to IST (33 of 82) and within 10 days of the first court date in 22% of those cases (20 of 82). Of the February 1990 IST cases, 12% (11 of 82) were left unassigned for more than three weeks. Excluding cases that had been screened in advance, DCFS failed to assign a caseworker within 5 days of the first court date in 60% of the February cases.[12]

35. DCFS also continued to leave cases unassigned, on the average, for nearly three weeks after IST completed its tasks. Stip. ¶24. DCFS also failed to modify its policy or its practices against the reassignment of cases in the area offices. Stip. ¶25. As a result, DCFS left cases previously assigned to absent caseworkers unassigned for an average of 30 days. *Id.*

36. System-wide caseworker assignment problems grew as well. Thus the total number of unassigned cases grew from 232 on June 30, 1989 to 404 by the end of 1989, paralleling the pattern of the previous year. P. Resp. Ex.

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[12] By agreement of the parties in open court on July 24, DCFS' February 1990 logs have been made Exhibit A to the Stipulations and are accordingly attached as part of Exhibit 3 to this opinion.

13. And the number of cases unassigned for over 30 days doubled over the same period of time. *Id.*

37. For an extended time period of many months during the pendency of this case, this Court had left DCFS wholly unconstrained by any order setting time requirements for caseworker assignments, because it had taken DCFS at its word that its adoption and implementation of the Reorganization Plan represented the "reasonable efforts" required by this statute. It was only after DCFS' performance had failed so substantially, with no adequate explanation offered by DCFS for that failure and with DCFS' unfulfilled generalized predictions having demonstrated a total lack of credibility, that the preliminary injunction order now on appeal was entered as required to satisfy DCFS' statutory "reasonable efforts" obligation. In doing so this Court (a) rejected plaintiffs' request for an order requiring such assignments to be made within 24 hours as an unrealistic requirement, (b) accepted DCFS' representations that a three-working-day requirement was capable of accomplishment (although DCFS did object to the entry of any such order) and (c) deferred the effective date of the preliminary injunction order by approximately 90 days, thus accepting DCFS' position as to the amount of additional time that it would need for that purpose.

Milton I. Shadur
United States District Judge

Date: July 25, 1990

EXHIBIT 1

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

June 21, 1990

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

ARTIST M., et al., Plaintiffs-Appellees,	)	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 90-1742 and 90-1764 v.	)	
GORDON JOHNSON, et al., Defendants-Appellants.	)	No. 88 C 10503
	)	Milton I. Shadur, Judge.

ORDER

The preliminary injunction entered by the district court requires that the Department of Children and Family Services (DCFS) assign a caseworker within three working days from the time plaintiffs' cases are first heard in juvenile court as well as within three working days from the time a previously assigned caseworker relinquishes any portion of a case. DCFS voluntarily instituted a Reorganization Plan which has as its goal the

reduction of delays in caseworker assignment to three to five days in most cases. It is unclear from oral argument before us and from the record what amount of delay currently exists between (1) a hearing in juvenile court and the assignment of DCFS caseworkers to that case, and (2) reassignment of a case to a new caseworker following the relinquishment of any portion of a case by the previously assigned caseworker. The record is also unclear on how far away DCFS is from attaining the goals outlined in that Plan. Accordingly, this appeal is remanded for the limited purpose of permitting the district court to hold an evidentiary hearing, if deemed necessary, and to enter written findings with respect to the extent of the present delay in caseworker assignment and reassignment and the extent to which DCFS has met its goals under the Plan. The district court should also inform us if a preliminary injunction is still necessary. We request that the findings be made as soon as possible, but no later than July 26, 1990.

The defendants' motion to strike pages 463 to 475 of the Appendix to the plaintiffs' brief is denied.

EXHIBIT 2

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

June 27, 1990

CORRECTED

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

ARTIST M., et al., Plaintiffs-Appellees, Nos. 90-1742 and 90-1764 v. GORDON JOHNSON, et al., Defendants-Appellants.	)	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 88 C 10503 Milton I. Shadur, Judge.

ORDER

Our order of June 21, 1990 remanded this appeal to the district court for entry of factual findings with respect to the current amount of delay in caseworker assignment and reassignment. We now modify that order and direct the district court to enter written findings on the following factual issues as they existed at the time the injunction issued: (1) the amount of delay between a hearing in

juvenile court and the assignment of DCFS caseworkers to that case, (2) the amount of delay between the time a caseworker relinquishes any portion of a case and the time a new caseworker is assigned, and (3) the extent to which DCFS has met its numerical goals, as set forth in our June 21, 1990 order, under the Reorganization Plan. We request, as before, that these findings be made as soon as possible, but no later than July 26, 1990.

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARTIST M., *et al.*,	)	
	)	
Plaintiffs,	)	No. 88 C 10503
v.	)	Hon. Milton I. Shadur
	)	
GORDON JOHNSON, *et al.*,	)	
	)	
Defendants.	)	

STIPULATIONS

Plaintiffs Artist M., *et al.*, by their attorneys, and defendants Gordon Johnson and Gary T. Morgan, by their attorneys, hereby jointly stipulate to the following facts.

Conditions as of December 1988

1. As of December 31, 1988, the Department of Children and Family Services ("DCFS" or the "Department") regularly delayed the assignment of cases to caseworkers capable of initiating child welfare services to the plaintiffs and their families. In most cases, DCFS did not assign a caseworker until at least two weeks after the first Juvenile Court date. In a large number of cases the delays lasted 30-45 days after plaintiffs' cases were initiated in Cook County Juvenile Court, with some delays in excess of 45 days.

2. These delays occurred in cases sent from DCFS's Office of Child Protection ("DCP"), the Department's investigative arm, to one of its Interim Services Teams ("IST"). IST handled new temporary custody cases except

sex-abuse cases. Other court cases, namely protective order and sex abuse cases, were sent from DCP directly to one of DCFS' area offices. There were similar 30-45 day delays in those cases.

3. In IST cases, the IST caseworker retained responsibility for the case for 30-45 days. After IST caseworkers completed their tasks, the IST supervisor called the Service Coordination Unit ("SCU"), which then assigned the case to a caseworker team at the appropriate area office. IST then sent the case file to the supervisor of the team through DCFS's messenger service, which operated three times per week. The supervisor of the team then would assign the case to a caseworker.

Reassignment of Cases

4. Follow-up caseworkers in the four area offices frequently transfer within the Department, take leaves of absence, are terminated, or resign from their positions in DCFS's area offices. (The following discussion will refer to these caseworkers in the aggregate as "absent caseworkers.")

5. As of December 31, 1988, DCFS policy allowed team supervisors 30 days in which to make decisions regarding the reassignment of the absent caseworkers' cases.

6. DCFS's management policy and practice permitted supervisors significant latitude and discretion in decisions regarding reassignment of cases. The cases of absent caseworkers generally were not reassigned for 30 or more days after their absences began.

Changes in DCFS's Caseworker Assignment System

7. In 1988, DCFS administrators became aware of delays in caseworker assignment. As part of their efforts to remedy those delays, on January 1, 1989, the Division of Cook County Operations ("DCCO") initiated use of an Early Response Package for cases transferred from DCP to IST.

8. The Early Response Package contains those investigation materials necessary to obtain a Juvenile Court order, enabling cases to be transferred out of DCP prior to completion of the entire investigation.

9. In February 1989, DCFS began sending certain protective order cases to private agencies under the Family First program, for provision of intensive home-based services by the private agencies.

10. By August 31, 1989, Family First had provided services to 169 families in Cook County under Juvenile Court protective orders.

11. Between January and May 1989, the Department added two new IST teams, bringing the total to four units, with the goal of eventually assigning all court cases to IST.

12. On May 22, 1989, DCP began transferring all new temporary custody cases involving sex abuse to IST.

13. DCFS's Cook County region contains four area offices, covering distinct geographic areas. On June 1, 1989, the four IST teams were geographically aligned with the four Cook County area offices.

14. On July 16, 1989, the DCP teams were geographically aligned with the four area offices.

15. In September 1989, the Department initiated a Home of Relative Initiative, which called for most cases involving children placed in foster care with relatives to be transferred to private agencies for case management and services, with a goal of reducing caseloads across the entire DCFS system.

16. On November 13, 1989, DCP began transferring protective order cases to IST. New court cases (other than previously opened cases, Home of Relative cases, or Family First cases) went from DCP to IST as of that date.

17. During 1989, the DCP and IST administrators monitored initial assignment of caseworkers at IST through, among other means, use of logs which reflected receipt of the case at IST.

18. In December 1989, the IST logs were modified to reflect actual assignment of an IST caseworker.

Conditions as of 1989 and Early 1990

19. Cases transferred from DCP directly to area offices during 1989 experienced delays similar to those in December 1988. Cases transferred from IST to area offices during 1989 experienced average delays of 19 days.

20. In January and February 1990, DCFS sent approximately 165 cases to IST for assignment of a caseworker. In some cases IST logs did not contain adequate information to determine the date on which a caseworker was assigned.

21. DCFS assigned a caseworker within five calendar days of the first court date in 90 (61 percent) of the remaining 146 cases sent to IST in January and February 1990. The Department failed to assign a caseworker within five calendar days in the remaining 56 cases (39 percent).

22. In January and February 1990, DCFS did not assign a caseworker within 10 calendar days of the first court date in 25 cases sent to IST, or 17 percent.

23. In January and February 1990, DCFS did not assign a caseworker within three weeks of the first court date in 14 cases sent to IST, or 10 percent.

24. As of March 2, 1990, cases transferred from IST to area offices were unassigned for an average of 19 days.

25. Defendants did not change DCFS's policy regarding the reassignment of cases previously assigned to absent caseworkers between December 31, 1988, and March 2, 1990. DCFS's practice as of March 2, 1990, left cases previously assigned to absent caseworkers unassigned, on average, for 30 days.

Dated: Chicago, Illinois
July 18, 1990

Respectfully submitted,

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EXHIBIT A

The DCFS February 1990 logs that constitute Exhibit A to the District Court's Findings of Fact are xerox copies of handwritten documents and as such could not be printed. They can be found at pages 35-47 of the appendix to Respondents' Brief in Opposition to the Petition for Certiorari.

SUPREME COURT OF THE UNITED STATES

No. 90-1488

Sue Suter, et al.,

Petitioners,

v.

Artist M., et al.,

Respondents.

ON CONSIDERATION of the motion of respondents for leave to proceed in forma pauperis without an affidavit of indigency executed by the respondents.

IT IS ORDERED by this Court that the said motion, be, and the same is hereby, granted.

May 13, 1991

Supreme Court, U.S.
FILED
JUL 18 1991
OFFICE OF THE CLERK

(5)

No. 90-1488

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SUE SUTER, *et al.*,

Petitioners,

v.

ARTIST M., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONERS

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(03

QUESTIONS PRESENTED

1. Whether the vague and amorphous terms of Section 671(a)(15) of the Adoption Assistance and Child Welfare Act of 1980 (the "AAA"), 42 U.S.C. § 671(a)(15), which requires that states have a plan to ensure that "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home," create individual federally-enforceable rights in the complex area of child welfare.

2. Whether Section 671(a)(15), codified in Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-79a, which does not provide any federal funds for services to children living at home, nonetheless creates a federal right to such services.

LIST OF PARTIES

The parties to the proceedings below were petitioners Sue Suter (and her predecessors Jess McDonald and Gordon Johnson), Director of the Illinois Department of Children and Family Services ("DCFS" or the "Department"), and Gary T. Morgan, DCFS Guardianship Administrator, both sued in their official capacities. Respondents included Artist M., Sarah B., Claude F., Algienan G., Myron C., Willie M., Brandon W., and Amber B., individually and on behalf of all similarly situated individuals, by their next friend Patrick T. Murphy, Public Guardian of Cook County, Illinois.

The district court certified two classes. Class A includes all children in the custody of DCFS pursuant to temporary custody orders entered by the Circuit Court of Cook County, Juvenile Division ("Juvenile Court"), and children who remain in their own homes under Juvenile Court protective or supervision orders, who are or will be without a DCFS caseworker for a significant period of time. Class B is a sub-class of Class A limited to children in the custody of DCFS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SUE SUTER, et al.,

Petitioners,

v.

ARTIST M., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 917 F.2d 980 and is reprinted in the Appendix to the Petition for a Writ of Certiorari[1] at page 1a.

The opinion of the United States District Court for the Northern District of Illinois (Shadur, J.) on defendants' motion to dismiss is reported at 726 F. Supp. 690 and is reprinted at App. 32a.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1990. (App. 1a). Defendants filed a timely petition for rehear-

[1]Record citations will use the following abbreviations. "J.A." cites to items in the Joint Appendix. "App." cites to items in the Appendix to the Petition for a Writ of Certiorari. "Tr." cites to transcripts in the district court. "R." cites to items in the district court record.

ing with suggestion for rehearing en banc with the court of appeals on November 14, 1990. On December 20, 1990, the court denied that petition. (App. 31a).

On March 20, 1991, defendants filed the Petition for a Writ of Certiorari ("Petition") in this Court. Twenty-eight states and the District of Columbia filed a brief in support of the Petition. This Court granted the Petition on May 13, 1991. This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 671(a)(15) of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(a)(15), codified as part of Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-79a, provides:

> (a) In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—
>
> . . .
>
> (15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

42 U.S.C. § 1983 ("Section 1983"), provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case concerns whether federal courts may alter the federal-state contract contained in a spending clause statute by creating new largely indeterminate federal rights in the complete absence of any statutory objective benchmarks defining those rights. Section 671(a)(15) of the AAA requires that States have a "plan for foster care and adoption assistance" providing that "in each case, reasonable efforts will be made" to keep a child at home or return a child home from foster care. The court of appeals majority held that this "reasonable efforts" clause creates federal rights enforceable through Section 1983. (App. 9a-14a). The court reached this conclusion without even acknowledging the well-established principle contained in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), that Congress must clearly define any federal rights imposed on the States in a federal funding statute, and without conducting the "crucial inquiry" required by *Pennhurst* as to Congress' intent in enacting Section 671(a)(15).

Utilizing a similar cursory analysis, the court of appeals also found that Section 671(a)(15) creates an implied private right of action (App. 14a-18a) without addressing the evidence in the language, structure, and legislative history of the statute to the contrary. In addition, the court held that this section also creates a federal right to services for children living at home (App. 18a), notwithstanding that the AAA provides no federal funds under Title IV-E for such services.[2]

---

[2]This appeal does not raise any factual issues regarding the two preliminary injunctions entered by the district court. These injunctions effectively require that DCFS immediately assign and continuously maintain a caseworker for each class member. (App. 51a, 57a). The Department does not contest the general proposition that under sound child welfare practices, cases should be assigned to caseworkers as quickly as possible. In fact, months before plaintiffs had even initiated this action, DCFS had recognized the existence of problems in its

(Footnote continued)

The Complaint And The Parties

Plaintiffs filed this action for declaratory and injunctive relief under Section 1983 on December 14, 1988, alleging that DCFS has violated the Fourteenth Amendment and Title IV-E by failing promptly to assign and reassign caseworkers to plaintiffs' cases. (J.A. 5).

Plaintiffs represent a class of children who are or will be in the custody of DCFS pursuant to temporary custody orders entered by the Juvenile Court, and children who remain in their own homes under Juvenile Court protective or supervision orders, who "are now or will be without a DCFS caseworker for a significant period of time." (R. 10).[3] Under the Illinois Juvenile Court Act, children may be removed from their parents and placed in the temporary custody of DCFS after a hearing and order by the Juvenile Court. Juvenile Court Act § 2-7, Ill. Rev. Stat. ch. 37, ¶ 802-7. The Juvenile Court Act also provides that the court may allow children to remain at home pursuant to involuntary protective orders or agreed supervision orders setting forth the conditions for maintaining the children at home. Juvenile Court Act §§ 2-24, 2-25, Ill. Rev. Stat. ch. 37, ¶¶ 802-24, 802-25. The Juvenile Court Act does not specify the terms of such orders or that such cases be placed under DCFS supervision. *Id.*

Defendant Sue Suter is the Director of DCFS. Defendant Gary T. Morgan is DCFS Guardianship Administrator. (J.A. 8). Plaintiffs sued defendants individually and in their official capacities, but, given that the Complaint seeks only declaratory and injunctive relief, this is an official capacity suit. (J.A. 9).

(Footnote 2 continued from previous page)
caseworker assignment procedures and begun implementing a Reorganization Plan to expedite case assignment. This appeal only concerns the underlying legal basis for plaintiffs' claims and the injunctions.

[3]The district court certified two plaintiff classes. The claims asserted by Class B, limited to children in DCFS custody, have been dismissed and are no longer at issue in the case. (R. 10).

DCFS is the sole state agency charged with providing child protective and child welfare services to abused and neglected children and their families in Illinois. Illinois Abused and Neglected Child Reporting Act ("ANCRA") § 7.3, Ill. Rev. Stat. ch. 23, ¶ 2057.3; Act Creating DCFS § 1, Ill. Rev. Stat. ch. 23, ¶ 5001. The Department investigates reports of abuse or neglect, offers protective services, and takes protective or temporary custody when necessary to protect a child. ANCRA § 2, Ill. Rev. Stat. ch. 23, ¶ 2052. The Department is required by state law to begin investigations within 24 hours of receipt of all child abuse and neglect reports called into the Department's statewide hotline. ANCRA § 4, Ill. Rev. Stat. ch. 23, ¶ 2057.4. In an average year, approximately half of those reports are "indicated," meaning the Department finds credible evidence of abuse or neglect. (1/17/89 Tr. at 263-64).

In addition to protective services, DCFS provides a wide array of child welfare services to children and families. The Department is the sole state agency providing and caring for children removed from their homes and placed in foster homes and other placements; providing placement prevention and reunification services; and placing children in adoptive homes. Act Creating DCFS § 5, Ill. Rev. Stat. ch. 23, ¶ 5005.

The Proceedings In The District Court

On the same day plaintiffs filed their Complaint, they filed a preliminary injunction motion seeking (i) assignment of a caseworker to plaintiffs' cases within 24 hours following the initial Juvenile Court order and (ii) continuous assignment of a caseworker thereafter. (R. 5). The district court held a hearing on plaintiffs' motion in January 1989. (1/17/89-1/19/89 Tr.). At the hearing, plaintiffs presented anecdotal evidence of delays in DCFS's assignment of caseworkers to cases. DCFS had recognized the problem of delays months before the litigation. Defen-

dants presented evidence of a Reorganization Plan the Department had previously initiated in an attempt to address delays in case assignment.

Following the hearing and briefing by the parties, the court did not rule on plaintiffs' motion for over a year. Eight months after completion of the hearing, the district court reopened discovery, so that plaintiffs could explore defendants' progress in implementing the Reorganization Plan. (R. 46). Because the court had extended discovery and deferred ruling on a preliminary injunction motion that lacked any legal foundation, defendants moved to dismiss plaintiffs' Complaint for failure to state a claim upon which the court could grant relief. (R. 51).

On November 21, 1989, the district court ruled on defendants' motion, granting the motion to dismiss plaintiffs' constitutional claims, but refusing to dismiss plaintiffs' claims under the AAA. (App. 32a). The court held in part that plaintiffs have a right under Section 671(a)(15) to obtain "preventive and reunification services." (App. 39a). Defendants filed a motion asking the court to reconsider its ruling, which the court denied on December 7, 1989. (R. 75).

In ruling on the motion to reconsider, the district court orally clarified its ruling and stated that the only remaining legal basis for plaintiffs' claims was the "reasonable efforts" clause, 42 U.S.C. § 671(a)(15). (12/7/89 Tr. at 2-3). The court also modified its view that the "reasonable efforts" clause creates a right to individual substantive services, instead stating that the AAA creates a right only to a "system" or "administrative arrangement" to provide "reasonable efforts." (*Id.* at 4, 6).

The district court's November 21, 1989 ruling on the motion to dismiss is the subject of this appeal. In addition to that ruling, the court of appeals reviewed a systemic, mandatory preliminary

injunction entered by the district court on March 2, 1990, after additional discovery and briefing by the parties. The March 2 injunction requires that DCFS assign a caseworker to all court cases within three working days of the initial Juvenile Court order and that no case remain unassigned for more than three working days at any time thereafter. (App. 51a). The order applies to all class members, including all children who remain at home under Juvenile Court orders. (App. 51a).

On plaintiffs' motion to amend the preliminary injunction, the district court on April 3, 1990, amended the injunction to require that DCFS each week provide plaintiffs with a list of newly assigned or reassigned cases, their assigned caseworkers and those workers' telephone numbers, and any previously assigned workers, for the stated purpose of monitoring defendants' compliance with the March 2 injunction. (App. 57a).

Defendants filed timely notices of appeal from the March 2 and April 3 injunctions and the ruling on defendants' motion to dismiss. (R. 99, 103). Defendants moved before the district court to stay the injunctions pending appeal to the Seventh Circuit. (R. 104). In denying that motion, the district court provided a third explanation as to what "reasonable efforts" the court believed were required by Section 671(a)(15) of the AAA.[4] The court concluded that, in initiating voluntary efforts to improve case assignment procedures, the Department itself had defined what "reasonable efforts" the AAA required, and, since those efforts were only 75 percent effective, defendants had failed to exercise reasonable efforts. (4/9/90 Tr. at 11-12, 18). Thus, the court created federal rights based on the State's own actions, an approach later adopted by the court of appeals.

---

[4]As discussed above, the district court first held that Section 671(a)(15) creates a right to preventive and reunification services. (App. 39a). The court later rephrased the right as encompassing only a "system" or "structure" that provides "reasonable efforts." (12/7/89 Tr. at 4, 6).

The Proceedings In The Court Of Appeals

After expedited briefing, the appeal was argued on June 20, 1990, just six days after this Court's decision in *Wilder v. Virginia Hospital Association*, 110 S. Ct. 2510 (1990). Following argument, the Seventh Circuit entered an order on June 21, 1990 (J.A. 49), which was modified on June 27, 1990 (J.A. 51), partially remanding the case to the district court. The court of appeals instructed the district court to make factual findings as to the amount of delay in caseworker assignment and reassignment at the time the injunction was issued. The district court made the requested findings based on written submissions from the parties and issued its opinion on July 25, 1990. (J.A. 28).

On October 29, 1990, a divided panel of the Seventh Circuit affirmed the district court's orders. (App. 1a). Judge Cummings' majority opinion, joined by Senior Judge Eschbach, held that the AAA's "reasonable efforts" clause, 42 U.S.C. § 671(a)(15), creates a federal right to reasonable efforts to prevent removal of children from their homes and to reunify children with their families. The court of appeals did not address the requirements for analyzing spending clause statutes set forth in *Pennhurst*. Instead, the court merely relied on *Wilder*'s result and found that a statute using the term "reasonable" and giving the states substantial discretion as to its implementation is not too vague to create enforceable rights. (App. 11a-12a). The court then looked to Illinois' own actions to define that term, which Congress left undefined in the AAA, and held that because Illinois uses caseworkers, it is "reasonable" to require prompt case assignment. (*Id.*).

Judge Manion filed a strong dissent, criticizing the panel majority for "inventing rights which interfere with the foster care system" (App. 27a), and for allowing a narrow focus on *Wilder*'s result to distract the court from "the more applicable legal standards and reasoning of *Pennhurst*." (App. 21a). The dissent warned that "[t]his opinion moves the court from its proper role

as impartial arbiter . . . to that of a crisis administrator of child welfare." (App. 29a-30a). Judge Manion recognized that by allowing any individual involved in the child welfare system to sue for "reasonable efforts," the majority vastly expanded federal court intervention into state child welfare decision making, opening the door to an "avalanche" of individual cases for which the federal courts are unprepared and ill-suited. (App. 29a). He predicted that the majority's holding will lead to "paralysis" of the child welfare system (App. 30a), a result inimical to the well-being of the children and families served by DCFS and child welfare agencies throughout the country.

SUMMARY OF ARGUMENT

Eleven years ago, Congress enacted the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-28, 670-79a, a federal-state cooperative funding statute, which, under Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-79a, provides federal reimbursement to the States for certain costs of maintaining a child in foster care. In return for federal funds, the States agreed to file a plan with the Secretary of Health and Human Services meeting certain requirements, including providing that "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home." 42 U.S.C. § 671(a)(15). No further definition or explanation of what constitutes "reasonable efforts" is provided anywhere in the statute.

In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), this Court held that federal funding statutes like the AAA are in the nature of "contracts." *Id.* at 17. The very legitimacy of Congress' power to legislate under its spending authority "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " *Id.* Thus, if Congress wishes to impose

individually enforceable obligations on the States, Congress must express those rights clearly, so that the States may fully comprehend the contours of the bargain they enter when accepting federal funds. *Id.* at 17, 23-25. "The crucial inquiry . . . [is] whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." *Id.* at 25.

The *Pennhurst* progeny further explained that in order to create federal rights under Section 1983, a statutory provision intended to benefit a plaintiff must be both mandatory *and* not too vague and amorphous such that it is beyond the competence of the judiciary to enforce. *See, e.g.*, *Wilder v. Virginia Hosp. Assoc.*, 110 S. Ct. 2510, 2517 (1990); *Wright v. Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 431-32 (1987). As demonstrated by this Court's most recent ruling in *Wilder*, a court construing a federal funding statute must conduct a crucial inquiry into the context, statutory structure, legislative history, and regulatory framework in order to ascertain whether Congress has provided the necessary "objective benchmark" clearly defining the purported federal rights. *Wilder*, 110 S. Ct. at 2518-23. Thus, following a searching analysis, this Court in *Wilder* concluded that the Boren Amendment to the federal Medicaid Act provided medical facilities with a federal right to receive "reasonable and adequate" reimbursement rates from the States, as measured against the statutory benchmark of an "efficiently and economically operated facility" providing standard care with reasonable access for eligible persons. *Id.* at 2523.

The court below, however, conducted no such crucial inquiry and did not even acknowledge the clear statement principle under *Pennhurst.* Instead, the panel majority cursorily adopted the result in *Wilder*, holding simply that because *Wilder* found a federal right to "reasonable and adequate" reimbursement rates, there must also be a federal right to "reasonable efforts" to keep or return a child home. Nothing in *Wilder*, however, supports the proposition that a court construing a "reasonableness" provision

may avoid the searching analysis called for by *Pennhurst* and its progeny.

Indeed, an examination of the child welfare context in which the AAA was adopted reveals that the concept of "reasonable efforts" to maintain an abused or neglected child in his home or return that child to his home from foster care is only one of a number of possible theories. The "reasonable efforts" clause was enacted in reaction to concerns that placing children in foster care using a judicial standard based solely on the "best interests of the child" ignored parental interests and was contributing to the growth in the number of children in foster care. Although Congress created a fiscal incentive encouraging a policy of "reasonable efforts," Congress also intended that state courts make the determinations balancing the "best interests of the child" and "reasonable efforts" to keep the child at home, in the context of the individual circumstances and risks posed by each case. *See* 42 U.S.C. § 672(a). However, there was and is no consensus that the theory of "reasonable efforts" toward family preservation and reunification should predominate. In fact, state courts, including the Illinois Appellate Court earlier this year, have reaffirmed that the "best interests of the child" are paramount. In view of this context, it is unlikely that Congress intended in the bare term set forth in Section 671(a)(15) to elevate one approach, meaning "reasonable efforts" to family preservation or reunification, to a federal right.

This conclusion is reinforced by the statutory structure and legislative history of the AAA. It is apparent that Congress was aware of the sensitive and unpredictable nature of the individual circumstances in child abuse and neglect cases, and chose to rely on State authorities, who have greater expertise and experience in this area, to determine "*in each case*" whether "reasonable efforts" were made. *See* 42 U.S.C. § 672(a). *Cf. DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298 (7th Cir. 1987), *aff'd*, 489 U.S. 189 (1989). Instead of the "*objective* bench-

mark" required by this Court in *Wilder*, Congress in Section 671(a)(15) explicitly intended a *subjective* standard that has meaning only in the context of an individual child and his family.

The dangers inherent in ignoring the principles of *Pennhurst* are apparent in the ruling below. In the absence of a clear statement by Congress defining the federal rights that plaintiffs assert, the court of appeals looked to Illinois' own actions to determine what rights the "reasonable efforts" clause creates. (App. 11a). Because Illinois chooses to use caseworkers, the court held it is "reasonable" to require that Illinois assign caseworkers immediately and continuously in plaintiffs' cases. The court's method of analysis leads to the incongruous result that a single federal statute, the AAA, creates different individual federal rights in different states, based on each State's actions after the State accepts federal reimbursement. The court of appeals thus removed the linchpin of *Pennhurst*—that States must be able to ascertain the extent of their obligations at the time they accept federal funds.

Moreover, by holding that every child served by a state child welfare agency may sue the State in federal court to enforce his own idea of what is "reasonable," the court of appeals opens the federal courts to an "avalanche" of litigation challenging the minutiae of daily child welfare decision making in individual cases. (App. 29a (Manion, J., dissenting)). The decision below federalizes child welfare law and "moves the court from its proper role as impartial arbiter of cases and controversies under the law to that of a crisis administrator of child welfare." (*Id.* at 29a-30a).

Finally, although this action and the AAA seek to promote improvements in State child welfare services, the likely result will be quite the opposite. Under the lower court's rubric, it is unlikely that States will create greater exposure for themselves by instituting new or innovative programs that may become federally en-

forceable rights under the "reasonable efforts" clause. Furthermore, the resulting litigation will lead to "considerable paralysis because any efforts deemed unreasonable by scrutinizing plaintiffs and courts could cease, resulting in no remedial efforts while litigation continues in situations where something must be done." (App. 30a (Manion, J., dissenting)).

Even if a federal right to "reasonable efforts" exists, Congress nonetheless has foreclosed enforcement of such a right under Section 1983. The AAA itself provides that State courts are to determine whether "reasonable efforts" have been made "in each case," in the context of the child's welfare and whether the child should remain at home. 42 U.S.C. § 672(a). In addition, Congress has provided for a case plan and case review process and a fair hearing procedure for individuals, in addition to the enforcement powers accorded the Secretary under the Act. 42 U.S.C. §§ 671(a)(15), 675(1), (5), (6).

The court of appeals compounded its error by holding that Section 671(a)(15) also is enforceable through an implied private right of action under the standard of *Cort v. Ash*, 422 U.S. 66, 78 (1975). As with the closely related Section 1983 analysis above, congressional intent is the most important factor in determining whether to infer a right of action from congressional silence. *See, e.g., Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979). Plaintiffs cannot possibly meet their heavy burden of showing that Congress intended to allow individual enforcement of Section 671(a)(15), when such enforcement is inconsistent with the language, structure, and legislative history of the statute.

The virtually boundless scope of the holding below is further evidenced by the fact that Title IV-E of the AAA, which by its terms provides no federal reimbursement for services to children living at home, nonetheless creates an enforceable right to "reasonable efforts" on behalf such children. By that holding, the

Seventh Circuit eliminated yet another clear requirement of *Pennhurst*—that Congress does not create federal rights without providing federal dollars to offset a "substantial" portion of the cost. *See Pennhurst*, 451 U.S. at 24.

This Court concluded its analysis of federal statutory rights in *Pennhurst* by observing: "In no case . . . have we required a State to provide money to plaintiffs much less required a State to take on such open-ended and potentially burdensome obligations as providing 'appropriate' treatment in the 'least restrictive' environment." *Pennhurst*, 451 U.S. at 29. The federal rights created by the opinion below are as much, if not more, open-ended and potentially burdensome as those rejected by this Court in *Pennhurst*. This Court should reaffirm the tenets of *Pennhurst* and reverse the decision of the court below.

ARGUMENT

I.

THE AAA'S VAGUE "REASONABLE EFFORTS" CLAUSE DOES NOT CREATE ENFORCEABLE RIGHTS UNDER SECTION 1983

In *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980), this Court held that Section 1983 provides a cause of action for violations of federal statutes as well as the Constitution. The Court, however, has recognized that a Section 1983 action will not lie where "(1) 'the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983,' or (2) 'Congress has foreclosed such enforcement of the statute in the enactment itself.' " *Wilder*, 110 S. Ct. at 2517 (quoting *Wright v. Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 423 (1987)). Under this two-step inquiry, the plaintiffs must first assert the existence of federal rights that have been violated. *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444, 448 (1989). Then, the defendants may show that even though a federal right exists,

Congress nonetheless " 'specifically foreclosed a remedy under § 1983,' by providing a 'comprehensive enforcement mechanis[m] for protection of a federal right.' " *Id.* (quoting *Smith v. Robinson*, 468 U.S. 992, 1003, 1005, n.9 (1984)).

Here, the court of appeals held that Section 671(a)(15) of the AAA creates individually enforceable federal rights to "reasonable efforts" to keep or return a child home. In so holding, the court misapplied the controlling precedent of this Court and disregarded the purpose, structure, and context of the AAA (Part A below).[5] Moreover, the court of appeals held that Congress had not specifically foreclosed a Section 1983 remedy, despite the provisions in the AAA deferring to state judicial proceedings (Part B below).

A. Congress Did Not Create A Clearly-Defined Federal Right To "Reasonable Efforts" In Each Case To Keep Or Return A Child Home

In *Pennhurst*, 451 U.S. at 17, this Court held that a federal-state cooperative funding statute, such as the AAA, is "in the

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[5]Prior to the decision below, the district courts within the Seventh Circuit were divided on this question. *Compare B.H. v. Johnson*, 715 F. Supp. 1387, 1401-02 (N.D. Ill. 1989) (Grady, C.J.) ("reasonable efforts" clause too "amorphous" to create enforceable rights) *and Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1012 (N.D. Ill. 1989) (Williams, J.) (same) *with Norman v. Johnson*, 739 F. Supp. 1182, 1187 (N.D. Ill. 1990) (Hart, J.) ("reasonable efforts" clause creates enforceable rights) *and Artist M.*, App. 32a (N.D. Ill. 1989) (same).

That split was reflected in other circuits as well. *Compare In re Scott County Master Docket*, 672 F. Supp. 1152, 1202-03 (D. Minn. 1987) ("reasonable efforts" clause does not create enforceable rights), *aff'd sub nom. Myers v. Scott County*, 868 F.2d 1017 (8th Cir. 1989) (adopting district court opinion and analysis) *and Scrivner v. Andrews*, 816 F.2d 261, 263 (6th Cir. 1987) (AAA creates no right to meaningful visitation) *and Winston v. Children & Youth Servs.*, 748 F. Supp. 1128, 1133 (E.D. Pa. 1990) ("reasonable efforts" clause does not create enforceable right to parent-child visitation) *with R.C. v. Hornsby*, No. 88 D-1170-N, slip op. (M.D. Ala. Apr. 19, 1989) ("reasonable efforts" clause creates enforceable rights).

nature of a contract." The very legitimacy of Congress' authority to create federal rights in a spending clause statute "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " *Id.* As this Court explained:

> There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress *speak with a clear voice*, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Id. (citations omitted) (emphasis added). "The *crucial inquiry* . . . [is] whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." *Id.* at 25 (emphasis added).

In *Pennhurst*'s progeny, this Court explained that the clear statement required by *Pennhurst* is satisfied only where a provision intended to benefit the plaintiff is (i) mandatory, and (ii) the interest asserted by the plaintiff is not " 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.' " *Golden State Transit Corp.*, 110 S. Ct. at 448 (quoting *Wright*, 479 U.S. at 431-32), *quoted in Wilder*, 110 S. Ct. at 2517. This Court also made plain that the crucial inquiry mandated by *Pennhurst* consists of an examination of the context of the statute, the statutory structure and language, the legislative history, and the regulations promulgated under the statute. *Wilder*, 110 S. Ct. at 2518-23; *see also Wright*, 479 U.S. at 433-35 (O'Connor, J., dissenting).

Notwithstanding this well-established precedent, the court below rejected *Pennhurst* on grounds wholly irrelevant to this case and failed to apply the necessary clear statement principle. Indeed, the court engaged in virtually no inquiry at all into the context, structure, and history of the AAA, let alone the crucial inquiry required by this Court. This omission is fatal to the

court's holding, for an examination of Section 671(a)(15) and the AAA compels the conclusion that Congress did not create a federal right to "reasonable efforts" to keep or return a child home. To rule otherwise, as the court of appeals did, is to open the federal courthouse door to an avalanche of individual actions challenging the case-by-case decisions of state child welfare authorities. Congress could not have intended such a result, which federalizes child welfare decision making—an area this Court repeatedly has recognized is uniquely within the ambit of the States—and if it had such an intent, Congress was required to more clearly and definitely say so.

1. The Court Below Failed To Follow The Standard And Analysis Required By *Pennhurst*

The court of appeals failed even to acknowledge the *Pennhurst* requirement of a clear statement creating a federal right. The court never conducted the crucial inquiry into congressional intent required by that case. Instead, the panel majority distinguished *Pennhurst* in a single paragraph, suggesting that *Pennhurst* is inapposite because the "reasonable efforts" clause is "tied indisputably to the funding provision" of the AAA, in contrast to the asserted right to "least restrictive" placements in *Pennhurst*. (App. 11a). Yet that argument goes only to whether Section 671(a)(15) is mandatory, a point not at issue in this case. *Pennhurst* also requires that Congress speak clearly when defining new federal rights.

Thus, this Court rejected the plaintiffs' claim in *Pennhurst* that the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6010, created a federal right to "appropriate treatment" in the "least restrictive setting." The Court found such an obligation on the States to be "largely indeterminate," requiring the application of the clear statement standard with "greatest force." *Id.* However, the Court found no such clear statement by Congress, holding that "[i]t is difficult to know what

is meant by providing 'appropriate treatment' in the 'least restrictive' setting, and it is unlikely that a State would have accepted federal funds had it known it would be bound to provide such treatment." *Id.* at 24-25.

Likewise, in *Wilder* last year this Court carefully conducted the crucial inquiry required by *Pennhurst* to determine whether the Boren Amendment to the Medicaid Act, 42 U.S.C. § 1396a(a)(13)(A), created an enforceable right under Section 1983. The Boren Amendment required that to receive federal Medicaid funds, a State must have a plan that provides for the payment of rates to medical facilities that the State finds are "reasonable and adequate." The Court held this provision to be "cast in mandatory rather than precatory terms," 110 S. Ct. at 2519, yet its analysis did not stop there. The Court also conducted a searching and detailed review of the context, statutory structure, legislative history, and regulatory framework of the Boren Amendment before concluding that Congress had intended to establish an enforceable right. Congress clearly defined this right by linking "reasonable and adequate" rates to an "objective benchmark." This "benchmark" consisted of statutory and regulatory factors to be used in calculating the reasonableness of such rates, including the specific statutory requirement that such rates be measured against the costs of "an efficiently and economically operated facility" providing standard care and reasonable access to eligible participants.[6] 110 S. Ct. at 2522-23. Moreover, the

[6]Similarly, in *Wright*, 479 U.S. 418, this Court found that the Brooke Amendment to the Housing Act of 1937, 42 U.S.C. § 1437a, created an enforceable right under Section 1983 to a "reasonable" rent allowance for utilities in public housing projects. In so holding, the Court reviewed the legislative history, statutory structure, and regulations implementing the Brooke Amendment. *Id.* at 430-32, 424-30. In particular, the Court found the statute limited rent amounts to an objective benchmark of no more than 30 percent of the tenants' income, and federal regulations specifically defined the "statutory concept of 'rent,' " and set forth guidelines for local authorities to follow in determining utility allowances. *Id.* at 431-32.

context and legislative history of the Boren Amendment evidenced an understanding by both Congress and the States that health care providers such as the *Wilder* plaintiffs had a federal right to enforce reasonable reimbursement rates.[7] *Id.* at 2521-22.

In contrast, the panel majority below conducted no inquiry, let alone the requisite crucial inquiry, into the structure and circumstances surrounding congressional enactment of the AAA. With a cursory discussion, the court below merely applied the result in *Wilder*, despite the material differences in context, statutory structure, legislative history, and regulatory framework, as set forth in Part I.A.2 below. As Judge Manion aptly noted in dissent, "the judicial treatment of the 'reasonableness' language found in *Wilder* and *Wright* should have no bearing on this case." (App. 24a). Contrary to the majority's suggestion, *Wilder* does not stand for the proposition that any statute using the term "reasonable" or "adequate" by definition creates enforceable rights.

As applied by the panel majority, *Wilder* eliminates the requirements under *Pennhurst* that Congress must speak with a clear voice when it intends to impose federal rights on the States

[7]The four dissenting Justices in *Wilder*, led by Chief Justice Rehnquist, would find that the statutory structure of the Boren Amendment shows that it merely requires a state plan, filed with the Secretary, with specified procedural findings and assurances by the State as to the reasonableness of its rates. *Wilder*, 110 S. Ct. at 2526-27 (Rehnquist, C.J., dissenting, joined by O'Connor, Scalia, and Kennedy, JJ.). To the extent the provision creates any enforceable rights at all, the dissenters argued, it creates a right only to have the plan filed and reviewed by the Secretary in accordance with the statute. *Id.* Section 671(a) of the AAA also merely requires that the State file a written plan with the Secretary. 42 U.S.C. § 671(a). Thus, this case presents an appropriate opportunity for the Court to reconsider the precise scope of its holding in *Wilder*, although such reconsideration is not necessary for a ruling that the "reasonable efforts" clause under the AAA does not create a federal right.

and that federal courts must closely inquire as to the indicia of that intent. Instead, the opinion below would find a federal right in any "reasonable efforts" or "best efforts" requirement, without reference to the objective benchmark or clear statement required by this Court.[8] As a result, new judicially-created rights will be imposed on the States without their voluntary and knowing acceptance. This outcome is contrary to the very "legitimacy of Congress' power to legislate under the spending power." *Pennhurst*, 451 U.S. at 17.

2. The AAA's Context, Structure, Legislative History, And Regulatory Scheme Demonstrate That Section 671(a)(15) Does Not Create A Federal Right

Instead of a mere analogy to the result in *Wilder*, *Pennhurst* requires a crucial inquiry into the circumstances underlying Congress' "unambiguous[ ]" intent to "impose a condition on the grant of federal moneys." *Pennhurst*, 451 U.S. at 17. This process, reaffirmed in *Wilder*, begins with "the context of the entire statute," and includes the statutory language and structure, legislative history and regulatory framework of the provision in question. *Wilder*, 110 S. Ct. at 2518-23.

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[8]The court of appeals relied heavily on the district court's notion that the "reasonable efforts" clause in the AAA was not too vague to be judicially enforceable because "[c]ourts have long proved themselves adequate to the task of enforcing contractual 'best efforts' obligations, and they equally regularly enforce commitments of parties to conduct themselves 'reasonably.' " (App. 11a (quoting App. 39a)). The question under *Pennhurst*, however, is not how reasonable efforts clauses generally are interpreted under contract law, but rather how Congress intended *this* "reasonable efforts" clause to be interpreted. Moreover, even in contract law, a court may find a "best efforts" clause to be too vague to be enforced where there are "no objective criteria against which either [party's] efforts can be measured." *Pinnacle Books, Inc. v. Harlequin Enters.*, 519 F. Supp. 118, 121 (S.D.N.Y. 1981) ("Essential to the enforcement of a 'best efforts' clause is a clear set of guidelines against which the parties' 'best efforts' may be measured.").

(a) There is no indication that Congress meant to create a federal right to one of many competing theoretical approaches to the complex problems of foster care

In *Wilder*, this Court held that courts must review the "entire context" of a federal funding statute in deciding whether Congress intended to create new enforceable rights. 110 S. Ct. at 2518. The "context" of Section 671(a)(15) differs radically from that of cases in which the Court has found enforceable rights.

Both *Wilder*, 110 S. Ct. 2510, and *Wright*, 479 U.S. 418, involved *monetary* calculations easily determined based on prevailing rates in the market. *Wilder* concerned a challenge to Medicaid reimbursement rates, while *Wright* found an enforceable right to a reasonable rent allowance. In both instances market rates, in addition to the objective benchmarks set forth in the statutes themselves, provided guidance as to what rate was "reasonable."[9]

By contrast, there is no market for "reasonable efforts" to keep or return a child home, and such "reasonable efforts" cannot be calculated or quantified. As the dissenting judge below stated:

> The disputed "reasonable efforts" clause of the AAA allows no such precision. The "reasonable efforts" clause creates no specific mandate to the DCFS. Therefore there is nothing for the court to determine as being reasonable or unreasonable. Rather than concentrating on the "reasonableness" of a particular governmental activity, § 671(a)(15) relates to the *overall* reasonableness of *every* aspect of the foster care program. This significantly distinguishes the present case from *Wilder* and *Wright*. . . . A state's duty to exert "reasonable efforts" in general does not suggest any particular obligation.

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[9]Similarly, *every* case in which this Court has found that provisions of the Social Security Act created enforceable rights under Section 1983 involved direct, easily calculated, monetary benefits. *See Wilder*, 110 S. Ct. 2510 (Medicaid reimbursement); *Maine v. Thiboutot*, 448 U.S. 1 (denial of AFDC monetary benefits for stepchildren); *Miller v. Youakim*, 440 U.S. 125 (1979) (AFDC benefits); *Rosado v. Wyman*, 397 U.S. 397 (1970) (reduction of AFDC benefits); *King v. Smith*, 392 U.S. 309 (1968) (same).

(App. 24a (Manion, J., dissenting) (emphasis added)). Therefore, "the Act gives a general directive that is much too broad to give a federal judge a proper gauge from which to measure reasonable efforts." (*Id.* at 25a).

Congress framed this general directive as part of its effort to "lessen the emphasis on foster care placement and . . . *encourage* greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes." (App. 6a (quoting S. Rep. No. 336, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. Code Cong. & Admin. News 1448, 1450) (emphasis added)). Thus, Congress expressed its encouragement, even preference, for a policy of family reunification and preservation, but "a congressional preference for certain kinds of treatment" is simply "too thin a reed to support the rights and obligations" created by the court below. *Pennhurst,* 451 U.S. at 19.

Indeed, in the child welfare context of the AAA, the "reasonable efforts" clause represents but one theory or approach to the problems of foster care. There is no indication that Congress intended not only to express a preference for one such theory but also to elevate it to the status of a federal right. *See, e.g.,* M. Wald, J. M. Carlsmith & P. H. Leiderman, *Protecting Abused and Neglected Children* 2 (1988) (discussing the AAA and noting that the "substantial changes in public policy that took place in the 1970's were based more on ideological and fiscal considerations than on evidence about the impact of various types of interventions on the development of abused and neglected children"); Garrison, *Child Welfare Decision Making: In Search of the Least Drastic Alternative,* 75 Georgetown L.J. 1745, 1759-60 (1987) (describing the AAA as the result of reforms initiated by proponents of the "new philosophy" of "minimum [state] intervention" in child welfare). One review of foster care prevention programs in place at the time the AAA was enacted concluded that despite

the "[c]onsiderable efforts" during the prior decade to develop program models to keep children in their own homes, no models had marked success in reducing such placements. Magura, *Are Services to Prevent Foster Care Effective?,* 3 Children and Youth Services Review 193, 207 (1981).[10]

The concept of a showing of "reasonable efforts" to preserve the family prior to removing a child from his home arose in part because of dissatisfaction with the judicial standard of "best interests of the child." By focusing solely on the "best interests" of an abused or neglected child, critics charged that parental interests were ignored and children were placed in foster care who might otherwise remain at home if some services were provided. Mnookin, *Foster Care—In Whose Best Interest?,* 43 Harv. Educ. Rev. 599, 613-627 (1973).[11]

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[10]This study observed that:

> [I]f placement is a highly situational and thus often unpredictable event, or if some placements can be avoided only at great per capita expense—conclusions compatible with the results of the studies examined—then perhaps a different approach to preventive services is required. Devoting disproportionate amounts of time and effort to the uncertain prevention of some placements may inevitably short-change the majority of children referred to protective services who lack adequate nurturing and could benefit from additional casework.

Id. Some more recent studies appear to reach similar conclusions that a uniform judgment cannot be made that placement prevention programs keeping a child at home are in all cases better than foster care. *See* M. Wald, J. M. Carlsmith & P. H. Leiderman, *supra,* at 185 (comparative study of children in foster care and children at home in family preservation programs concludes "[i]n sum, although there was relatively little major change among the children in either group, there is some indication that foster care was more beneficial to the children most at risk"); Garrison, *supra,* at 1802 (citing significant problems with family preservation programs and concluding that "[b]ecause of these disadvantages of in-home intervention, I find it difficult to agree with other minimum intervention theorists who urge that in-home services should presumptively be preferred to placement.").

[11]*See also,* Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy,* 39 Law and Contemporary Problems 226,

(Footnote continued)

These criticisms were referred to by Congress in its consideration of the AAA, 125 Cong. Rec. 22681 (1979) (statement of Sen. Cranston upon introduction of Senate bill that resulted in the AAA), and led to the adoption of Section 671(a)(15). Section 671(a), however, does not also include any reference to the "best interests of the child" or any similar standard.

The following provision, Section 672(a)(1), does include a requirement that in order to receive Title IV-E funds, a foster care placement must be the result of a judicial determination that continuation at home "would be contrary to the welfare of such child and that reasonable efforts of the type described in Section [6]71(a)(15) have been made." 42 U.S.C. § 672(a)(1) (parenthetical omitted). This term was included in response to the "best interests" critics in order to provide an incentive to the States to weigh both the child's welfare and parents' interests before making foster care placements. S. Rep. No. 336, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. Code Cong. Admin. News 1448, 1464-65. The legislative history makes clear, however, that the judicial determinations weighing these competing interests were to be made by "the judiciaries of the States." *Id.* at 1465; *see also* Part I.A.2.(b) below. Thus, Congress could not have intended in Section 671(a)(15) to render a nullity Section 672(a)'s state court

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(Footnote 11 continued from previous page)
240-49, 272-81 (1975) (suggesting instead of "best interests of the child" a standard requiring a showing that there are "no reasonable means" to protect the child's health without removing the child from home); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights,* 28 Stanford L. Rev. 623 (1976). Another alternative to the "best interests of the child" suggested at the time was a standard based on the "least detrimental available alternative for safeguarding the child's growth and development." J. Goldstein, A. Freud, A. Solnit, *Beyond the Best Interests of the Child* 53 (1973); *see also* Mnookin, *Child Custody Adjudication, supra,* at 248; Garrison, *supra,* at 1762-66, 1825 (criticizing Goldstein, Freud, and Solnit standard). *Cf. In re Angelia P.,* 28 Cal. 3d 908, 916-17, 623 P.2d 198, 202, 171 Cal. Rptr. 637, 641-42 (1981) (discussing "the evolving 'parental preference' and 'child's best interests' standards").

balancing of "best interests" and "reasonable efforts" by creating a federal right to "reasonable efforts" alone.

The debate between the "best interests of the child" and "reasonable efforts" to family reunification or preservation continues to this day in the state juvenile courts. *Compare In re Welfare of J.J.B.*, 390 N.W.2d 274, 278-80 (Minn. 1986) (discussing the "major philosophical concepts" of the AAA and adopting the "best interest of the child standard as a paramount consideration" in temporary or permanent placement procedures) *and In re Edward C.*, 126 Cal. App. 3d 193, 206, 178 Cal. Rptr. 694, 701 (1981) (refusing to order detailed reunification plan that would have been "futile" because, although legislature was concerned with family relationships, legislature did not intend "a mechanical approach to a reunification plan for a family. Such a plan must be appropriate for each family and be based on the unique facts relating to the family.") *and In re C.L.M.*, 625 S.W.2d 613, 617 (Mo. 1981) ("[i]n any proceeding involving child custody the overriding consideration is the welfare of the child") *with In re Kirk Stewart*, No. CA-3075, slip op. (Ohio App. Feb. 27, 1985) ("best interests of the child" no longer paramount and may receive less consideration than judging efforts at reunification).

The Illinois Appellate Court recently has held that in all guardianship and custody cases, "the issue that singly must be decided is the best interest of the child." *In re Ashley K.*, 212 Ill. App. 3d 849, 879, 571 N.E.2d 905, 923 (1991).[12] In reversing the juvenile court's decision attempting to balance the interests of the child's parents in reunification with the interests of a child who had been in foster care for five years, the appellate court, despite recognizing the AAA's reunification aim, *id.* at 871, 571 N.E.2d at 918, held that:

> A child's best interest is not part of an equation. It is not to be balanced against any other interest. In custody cases, a child's best interest is and must remain inviolate and impreg-

[12]The appeal in *Ashley K.* was filed by counsel for plaintiffs in this case.

> nable from all other factors, including the interests of the biological parents.

Id. at 879, 571 N.E.2d at 923.[13] *See also In re Violetta B.*, 210 Ill. App. 3d 521, 534, 568 N.E.2d 1345, 1353 (1991) ("best interest of the child" should control placement decision when child is removed from home).

If upheld, the opinion below will create a federal right to "reasonable efforts" to family reunification and preservation that will place the federal courts in direct conflict with these state court rulings. There is no indication that Congress intended this level of interference with State decision making; to the contrary Congress intended to defer to the States, as evidenced by Section 672(a). Clearly, in the context of competing child welfare theories, Congress did not choose to single out one such theory and make it a federal right.[14]

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[13]The *Ashley K.* decision (referred to in the press as the "Sarah" case) has highlighted the tension between "reasonable efforts" to keep an abused or neglected child at home and the child's best interests. *See, e.g.*, Gratteau, *When Do Bad Parents Lose Rights?*, Chicago Tribune, Apr. 21, 1991, at 1, col. 1. This article notes that "[a]t the core of the controversy over the state of child welfare is the concept of family reunification," and quotes plaintiffs' counsel as observing that " 'judges and DCFS are working under the assumption that there are no bad biological parents.' " *Id.* at 12, col. 1-2. *See also* Murphy, *New DCFS Report Leaves Kids in the Cold*, Chicago Sun-Times, Feb. 2, 1991, at 12 (criticizing report recommending that DCFS devote more resources to reunification and placement prevention rather than to developing institutions for long-term placement). One child welfare advocate noted in the Chicago Tribune that "[w]e have these wide mood swings or fads. At one time, we're placing everybody. Then, we're reunifying everybody. We zig and we zag with no particular reason. We need a wide range of options so that people can make Solomon-like decisions." Gratteau, *supra*, at 12, col. 6 (quoting Peter W. Forsythe, Director, Edna McConnell Clark Foundation program for children).

[14]It is especially unlikely that Congress would preempt State decision making in light of the traditional deference accorded the States in matters of child welfare and family law. *See Thompson v. Thompson*, 484 U.S. 174, 186 (1988) (federal courts have "little expertise to resolve"

(Footnote continued)

(b) Instead of an objective benchmark the statutory structure and language of the AAA make plain that "reasonable efforts" can only be determined subjectively in "each case"

All nine Justices agreed in *Wilder* that the starting point in determining whether a statute creates enforceable rights is the statute itself. *See Wilder*, 110 S. Ct. at 2517-18; *id.* at 2526 (Rehnquist, C.J., dissenting). The AAA's structure clearly demonstrates that Congress recognized and intended that the concept of "reasonable efforts" to keep or return an abused or neglected child home has meaning *only* in the subjective context of a given individual case.

Section 671(a)(15) of the AAA stands in stark contrast to the Boren Amendment construed in *Wilder*. The "reasonable efforts" clause here states only that in order to receive Title IV-E funds, a State must have an approved plan which

> (15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

42 U.S.C. § 671(a)(15).

(Footnote 34 continued from previous page)
family law disputes); *Moore v. Sims*, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern."); *United States v. Yazell*, 382 U.S. 341, 352 (1966) ("Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements."); *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890) ("[t]he whole subject of the domestic relations of husband and wife, parent and child," is relegated to the states). As one court has admonished, the federal courts should not be injected

> into an area in which they have little knowledge or experience: that of child welfare. Balancing the rights of parents with those of their children is a task as difficult as it is delicate, and we doubt that it will be performed better under the eyes of federal courts . . . than by the state judicial and administrative authorities.

DeShaney, 812 F.2d at 304.

By comparison, the Boren Amendment requires that States have a Medicaid plan providing for the payment to medical facilities

> through the use of rates (determined in accordance with methods and standards developed by the State . . .) *which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities* in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access . . . to inpatient hospital services of adequate quality. 42 U.S.C. § 1396a(a)(13)(A) (1982 ed., Supp. V) (emphasis added).

Wilder, 110 S. Ct. at 2514.

Obviously, the Boren Amendment, unlike the "reasonable efforts" clause, explicitly sets forth the context and standards by which "reasonable and adequate" rates are to be measured, including the nature of the medical facility ("efficiently and economically operated"), the level of care provided ("in conformity with applicable State and Federal laws, regulations, and quality and safety standards"), and for which population with what frequency ("individuals eligible for medical assistance" with "reasonable access" to adequate inpatient services).[15] Based on this

[15]In their Brief in Opposition to the Petition, plaintiffs assert that the *Wilder* Court also held enforceable the "reasonable access" portion of the Boren Amendment. (Brief in Opposition at 24). However, the *Wilder* plaintiffs were not Medicaid recipients seeking "reasonable access" to medical services; they were medical providers seeking reimbursement for providing those services. Therefore, this Court was not presented with, and did not reach, the question whether an individual Medicaid recipient could sue the State for failure to provide "reasonable access" to medical facilities. Instead, the "reasonable access" term of the Amendment, like the "efficiently and economically operated facilities" term, merely serves to make the definition of "reasonable and adequate" rates more precise. *See Wilder*, 110 S. Ct. at 2523.

extensive language, this Court found that the Boren Amendment provided an "objective benchmark" to judge the reasonableness of a State's Medicaid rates. *Id.* at 2522-23.

Nothing remotely approaching an "objective benchmark" is set forth in the AAA. Indeed, instead of an *objective* benchmark, the "reasonable efforts" clause contains the *subjective* requirement that "reasonable efforts" be determined "*in each case*." Thus, Congress recognized and intended that in the highly charged and emotional area of child welfare, the determination as to what, if any, efforts are reasonable to keep or return an abused or neglected child home must be measured against the unique circumstances and interests of each child and his parents. As the dissent below noted, "Since every case will be different, 'reasonable efforts' cannot be expected to be the same." (App. 27a (Manion, J., dissenting)). Thus, the "reasonable efforts" clause by its terms, unlike the Boren Amendment, precludes reference to any generalized objective benchmark.[16]

The highly individualized nature of the "reasonable efforts" determination is underscored by Section 672(a), which requires

[16]Indeed, the district court in this case recognized that under *Pennhurst*, a "case-by-case personalized determination with no definable standard" could not give rise to an enforceable right under Section 1983. (12/7/89 Tr. at 5). The court attempted to distinguish the "reasonable efforts" clause by misreading Section 671(a) as requiring that States have a *system* in place to provide "reasonable efforts" instead of a "plan." (*Id.* at 6-8). (*See* Brief in Opposition at 36 (adopting the district court's reasoning)). Even if the district court's systemic limitation on Section 671(a)(15) had some basis in the statute, the courts below erred by examining a single aspect of the DCFS system, namely the case assignment process. If the AAA requires an overall system, then the determination whether DCFS meets that requirement must entail an examination of the Department's *entire* system, or the entire plan filed with the Secretary. Piecemeal challenges to isolated aspects of that system will lead to the creation of innumerable rights, such as the right to continuous assignment of a caseworker asserted by plaintiffs here, which bear little or no relationship to the AAA's specific requirements.

that in order to be eligible for federal reimbursement a child must be removed from his home as "the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and (effective October 1, 1983) that reasonable efforts of the type described in Section [6]71(a)(15) have been made." 42 U.S.C. § 672(a)(1). The judicial determination required by Congress in Section 672(a) is an individual one taking into account the "welfare of *such* child," the "effect of continuation" in the child's home, and the "reasonable efforts" made. The concept of "reasonable efforts," isolated in Section 671(a)(15), has no other objective meaning or benchmark and cannot have been intended to create a federal right in isolation. *See* Part I.A.2.(a) above.[17]

When Congress chose to define terms contained in Section 671(a), it proved capable of doing so. *See Pennhurst*, 451 U.S. at 23 (contrasting 42 U.S.C. § 6010 with other more definite sections of the same statute and noting that "[w]hen Congress intended to impose conditions on the grant of federal funds . . . it proved capable of doing so."). Although there is no definition anywhere in the AAA of Section 671(a)(15), Congress set out specific, detailed definitions of the "case plan" and "case review system"

[17]The requirement in Section 672(a) of an individualized judicial determination of "reasonable efforts" to keep or return a child home does not mean the clause has been sufficiently defined by Congress to be "judicially enforceable." *Wilder*, 110 S. Ct. at 2522. To the contrary, Section 672(a) makes clear Congress' understanding that the reasonableness of any efforts to keep a child at home with abusive or neglectful parents may be judged only against *that child's* unique circumstances, welfare and risk of harm. The substantial discretion accorded the States in the AAA is not to develop an overall rate methodology, as in *Wilder*, but to evaluate each individual child's case on its unique facts. Similarly, contrary to plaintiffs' suggestion, the fact that Illinois has amended its state laws to include the individualized "reasonable efforts" determinations required by Section 672(a) does not create any objective definition of "reasonable efforts." (Brief in Opposition at 24-25). In any event, such definition under *Pennhurst* must be provided by Congress, not an individual State.

required under Section 671(a)(16).[18] *See* 42 U.S.C. § 675(1), (5) (captioned "Definitions").

Finally, the federal funding mechanism of Title IV-E reinforces the conclusion that Congress did not intend to create a federal right to "reasonable efforts." While the States receive federal funds under Title IV-E for certain foster care costs, no federal funds are provided under Title IV-E for services to make "reasonable efforts" to preserve or reunite a family.[19] As this Court held in *Pennhurst,* "[w]hen Congress does impose affirmative ob-

[18]Plaintiffs' Complaint originally included claims based on Sections 671(a)(9) and 671(a)(16) in addition to 671(a)(15). In ruling on defendants' motion to reconsider the court's decision denying defendants' motion to dismiss, the district court informed the parties that the sole remaining claim was that raised under Section 671(a)(15). (12/7/89 Tr. at 2-3).

The district court clearly was correct in dismissing claims under Sections 671(a)(9) and 671(a)(16). Section 671(a)(9) requires only that the state report "known or suspected" cases of abuse to appropriate authorities; it nowhere imposes an affirmative obligation to seek out unknown or unsuspected abuse. Only the latter "right" could possibly support the right to continuous assignment of a caseworker asserted by plaintiffs. Similarly, if Section 671(a)(16) creates a right to case plans and case reviews, that right cannot be transformed into a right to immediate and continuous assignment of a caseworker. The AAA requires only that DCFS draft a case plan within *60 days* after DCFS takes custody of a child, 45 C.F.R. § 1356.21(d)(2), and conduct case reviews every *six months*, 42 U.S.C. § 675(5)(B). Plaintiffs have not alleged, and could not allege, a systemic failure to assign caseworkers for such lengthy periods. By contrast, in *Lynch v. Dukakis*, 719 F. 2d 504 (1st Cir. 1983), the court imposed a 24-hour case assignment requirement only after finding that the state had failed utterly to satisfy the procedural requirements of Section 671(a)(16).

[19]Title IV-E, 42 U.S.C. §§ 670-79a, the portion of the AAA containing Section 671(a)(15), reimburses the states for the costs of maintaining a child in foster care, *see* §§ 670, 672, which are defined in the Act as "payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation." § 675(4).

ligations on the States, it usually makes a far more substantial contribution to defray costs." *Pennhurst*, 451 U.S. at 24.[20]

(c) The AAA's legislative history further evinces Congress' intent to leave decisions in individual cases to the States

In the legislative history Congress made clear its desire to defer to the States and experienced child welfare administrators in the application of the AAA in general and the "reasonable efforts" clause in particular. In contrast, in *Wilder*, the Court relied heavily on the legislative history demonstrating congressional intent to allow medical providers private enforcement rights under the Medicaid Act. *See Wilder*, 110 S. Ct. at 2521-22.[21]

The House Ways and Means Committee Report on the AAA specifically states:

> [T]he Committee recognizes that the preventive services requirement would be inappropriate in certain specific circumstances. This would be the case where the home situation

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[20]In the absence of Title IV-E funds for services to provide "reasonable efforts," the practical outcome of a ruling nonetheless creating a federal right to such efforts ironically could result in States abandoning the AAA and its goals altogether. A series of federal judicial orders mandating sweeping services to provide "reasonable efforts" could prove to be more costly to the States than the foster care maintenance payments received from the federal government. In that event, the States may well determine that the liability associated with participation in the "cooperative" federal-state program under the AAA outweighs the financial benefits. *Cf.* Magura, *supra*, at 208 (raising concerns as to potentially high per capita cost of family preservation programs).

[21]Congress enacted the Boren Amendment in 1980 to change the Medicaid reimbursement standard for nursing and intermediate care facilities, and one year later extended the Amendment to hospitals. *See Wilder*, 110 S. Ct. at 2513 n.2 (citations omitted). Congress enacted the Amendment out of a concern that the federal government was wielding too much control over reimbursement rates, leading to rapidly escalating Medicaid costs. *Id.* at 2515. While Congress intended to give the states more flexibility in setting rates, the Medicaid Act's history contains *explicit* statements that Congress intended that providers retain a cause of action for injunctive relief. *Id.* at 2521-22. The Court relied heavily on those statements in finding that the Boren Amendment creates enforceable rights. *Id.*

> presents a substantial and immediate danger to a child which would not be mitigated by the provision of preventive services. . . .
>
> The Committee recognizes that the entire array of possible preventive services are not appropriate in all situations. *The decision as to the appropriateness of specific services in specific situations will have to be made by the administering agency having immediate responsibility for the care of the child.*

H.R. Rep. No. 96-136, 96th Cong., 1st Sess. 47 (1979) (emphasis added). Congress thus chose not to define "reasonable efforts" or otherwise tie that requirement to an "objective benchmark."

Indeed, the need for flexibility and deference to the states with respect to day-to-day decisions in child abuse and neglect cases is evident throughout the AAA's legislative history. *See, e.g.*, S. Rep. No. 336, 96th Cong., 2d Sess. 1, 16, *reprinted in* 1980 U.S. Code Cong. & Admin. News 1448, 1466 (recognizing that progress in restructuring foster care system "cannot be achieved by 'Federal fiat,' " but only through state governments "which have primary responsibility" for these programs); 125 Cong. Rec. 22685 (1979) (remarks of Sen. Cranston)[22] (Congress intended to "leav[e] to the discretion of the States the precise mechanisms for protecting the rights of persons in the foster-care system"); 125 Cong. Rec. 22692 (1979) (remarks by Sen. Moynihan) ("Insofar as it is within the limited abilities of the Federal Government to encourage the return of youngsters to their homes or their adoption, our policies should be so shaped").

(d) The AAA's implementing regulations provide no guidance as to what efforts are "reasonable" in individual cases

Like the AAA itself, the regulatory framework provides no "objective benchmark" by which "reasonable efforts" can be measured. In *Wright* and *Wilder*, this Court found that the statutes' implementing regulations channeled the discretion of State

[22]Senator Cranston was the AAA's sponsor.

decision makers. Thus, in *Wright*, 479 U.S. at 432, the Court found the regulations contained specific guidelines for housing authorities to follow to determine a reasonable utility allowance, thereby creating a sufficiently specific and definite right. Similarly, in *Wilder*, the Court reinforced its conclusion that the Boren Amendment, already tied to an objective benchmark in the statute itself, was sufficiently specific to create enforceable rights, by looking to regulations that further defined factors the States "*must*" consider in setting rates. *Wilder*, 110 S. Ct. at 2522-23.

In contrast to the mandatory regulations at issue in *Wilder* and *Wright*, Section 671(a)(15)'s implementing regulation contains a laundry list of services the States "*may*" provide. 45 C.F.R. § 1357.15(e)(2). Likewise, the list of services gives no indication as to which services are "reasonable" in which cases. The regulation, like the AAA itself, provides no "gauge" by which federal courts may measure the reasonableness of state efforts in individual cases. (*See* App. 24a-25a (Manion, J., dissenting)). Plaintiffs' argument to the contrary (Brief in Opposition at 23) is untenable and is specifically refuted by the explanatory comments published by the Department of Health and Human Services ("HHS") at the time it issued the regulations.

In response to comments during the federal rule-making process requesting that HHS issue a rule mandating the provision of certain services under the "reasonable efforts" clause, HHS responded that "[t]he Department believes that it is *an inappropriate and unnecessary Federal intrusion to dictate nationally* a specific set of services which may or may not address a particular State's situation. Moreover, the Department believes that *it is essential to give States the flexibility and responsibility for these service decisions*." 48 Fed. Reg. 23107 (May 23, 1983) (emphasis added). HHS went on to note, however, that States would be required to identify in each individual child's case record the

services offered to the child and parents to prevent placement or reunify the family. *Id.* This requirement merely emphasizes Congress' approach that "reasonable efforts" be determined only in the context of each individual case.

3. Congress Could Not Have Intended To Create Different Federal Rights In Different States Or The Avalanche Of Federal Litigation And Federalization Of Child Welfare That Will Result From The Lower Court's Holding

The hazards of failing to adhere to the careful limits placed by *Pennhurst* on the creation of federal rights are evident in the likely outcomes from the decision below. First, by using the State's own administrative actions to define a federal statute left undefined by Congress, the court of appeals has created a federal right that by definition will vary radically from state to state. Moreover, the absence of an objective benchmark to limit this new right to "reasonableness" means the ruling below is boundless and will lead to a flood of individual lawsuits in federal court, not the state juvenile court, to enforce each individual child or parent's view of "reasonable efforts."

Finally, this ruling will choke the very innovation and improvement in child welfare services that was the stated purpose of the AAA. If each administrative act or program is subject to becoming a federally enforceable right, it is unlikely that the States will create greater exposure for themselves by initiating new services. As the dissent below warned, "Ironically, this decision, while attempting to advance the well-being of abused children, may instead result in the delay or denial of benefits." (App. 30a (Manion, J., dissenting)).

(a) By failing to apply the *Pennhurst* standard, the court improperly concluded that the AAA creates different federal rights in different states

Since the AAA itself is devoid of any objective benchmark for "reasonable efforts," the court of appeals looked to Illinois' own voluntary actions to determine what "rights" the AAA creates. (App. 11a-12a). That sort of judicial boot-strapping is flatly contrary to *Pennhurst.*

The court below reasoned that because Congress directed the States to devise a plan to provide "reasonable efforts" and left the method of delivery up to the States, each State's actions to develop programs and provide services are determinative of its liability under Section 671(a)(15). (App. 11a-12a). Following this analysis, the court held that Illinois' decision "to use caseworkers as the means through which these services are provided" created an enforceable right to have a caseworker assigned to each case within three days of the initial court order. *(Id.).*

The court claimed to rely on *Wilder* for this analysis:

> In *Wilder*, the Supreme Court stated that simply because a provision gives the state great latitude in promulgating a "reasonable and adequate" rate does not render the provision unenforceable for vagueness. Instead, once the state exercises its discretion to select a method of calculating rates a court is still capable of determining whether the rate itself is reasonable in light of the method chosen. *Wilder*, 110 S. Ct. at 2522-23.

(App. 11a).

In fact, nothing in *Wilder*, on the pages cited or elsewhere, stands for the proposition that a court may determine what Medicaid reimbursement rates are "reasonable and adequate" by looking after the fact to the rates that States voluntarily adopt. Rather, this Court required that the reasonableness of a State's rates be measured "against the objective benchmark of an 'efficiently and economically operated facility,'" as set forth in the

Boren Amendment itself. *Wilder*, 110 S. Ct. at 2523 (quoting 42 U.S.C. § 1396a(a)(13)(A)). Here, the AAA contains no such objective benchmark.

The analysis below is directly contrary to this Court's holding in *Pennhurst* that the legitimacy of federal-state cooperative funding statutes rests on the ability of States to determine the extent of their obligations at the time they accept federal money. *Pennhurst*, 451 U.S. at 17. "Though Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post acceptance or 'retroactive' conditions." *Id.* at 25. Not only is the court's creation of a new federal right ten years after passage of the AAA a surprise, but it is particularly unexpected for the States to find that individual State administrative and program actions form the basis for the substance of that new federal right.

The panel majority attempted to ameliorate the effect of its ruling by noting that "[t]he district court sought out and discovered a method of enforcing the 'reasonable efforts' requirement that is tailored to DCFS practices." (App. 13a). The anomalous result, however, is that the purported federal right to "reasonable efforts" to keep or return a child home will be substantively different from state to state, and could vary even from district to district within a state. Nothing in *Wilder* supports such a result. Although this Court recognized that the Boren Amendment accorded States the discretion to choose among varying methods of calculating rates, the uniform right established under the federal statute was to "reasonable and adequate" rates as measured against the objective benchmarks set forth by Congress. *Wilder*, 110 S. Ct. at 2522-23.

(b) The virtually boundless right to "reasonable efforts" makes the federal court, not State authorities, the "crisis administrator of child welfare"

The new federal right created by the opinion below means that every child served by a state child welfare agency may sue the State when that child, or the child's advocate, believes that the State's efforts have not been "reasonable." (*See* App. 29a (Manion, J., dissenting)). The resulting "avalanche" of Section 1983 litigation will "move[ ] the court from its proper role as impartial arbiter of cases and controversies under the law to that of a crisis administrator of child welfare." (App. 29a-30a (Manion, J., dissenting)).

The federal court's role as a "super-juvenile court" second-guessing specific state decisions and actions in individual cases is aptly illustrated by *Norman v. Johnson*, 739 F. Supp. 1182, decided shortly after the district court's ruling here. In *Norman*, the court engaged in a detailed review of the circumstances and services provided to the parents in three individual cases. *Id.* at 1196-1202. After finding that Illinois had not exercised "reasonable efforts" to reunify two of the families, the court issued individualized injunctions on behalf of those parents. *Id.* at 1192. The court denied injunctive relief for the third parent because the court found the State's efforts "reasonable." However, the court also indicated that it might reconsider that ruling if the State did not provide the parent in question with sufficient beds. *Id.* at 1208 & n.8 (Report and Recommendation of Magistrate adopted by district court).[23]

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[23]*Norman* also illuminates the flaws in plaintiffs' argument that abstention and collateral estoppel regularly would bar federal courts from reviewing individual "reasonable efforts" claims. Although raised by DCFS, the *Norman* court rejected both arguments. *See Norman*, 739 F. Supp. at 1189-90. Thus, the *Norman* parents were able to use Section 1983 to bypass the state juvenile court system to enforce their idea of "reasonable efforts." *Norman* highlights the fact that if Section 671(a)(15) creates a federal right, the federal courts likely will supplant much of the state juvenile justice system, a result contrary to the structure of the AAA. *See* 42 U.S.C. § 672(a).

The court of appeals was aware of *Norman* when it decided this case (*see* App. 14a (citing *Norman*)), and made only the cursory comment that it was "not creating federally enforceable rights to beds, monetary assistance, or housing." (App. 16a-17a). Yet, the court gave no explanation how *Norman* would come out differently under its holding, or why the federal courts will not see an "avalanche" of *Norman* cases.[24]

To the extent plaintiffs would suggest that an enforceable right to "reasonable efforts" is somehow necessary to sustain systemic challenges to state child welfare systems, plaintiffs overlook the significant constitutional claims that have been found in other actions. *See, e.g., B.H. v. Johnson*, 715 F. Supp. 1387 (dismissing "reasonable efforts" claim but upholding sweeping challenges to the entire foster care system based on substantive due process rights); *see also K.H. v. Morgan*, 914 F.2d 846 (7th Cir. 1990); *Aristotle P. v. Johnson*, 721 F. Supp. 1002. As Judge Manion noted, "Until Congress specifies certain individual rights under the AAA, this court should confine § 1983 actions against the DCFS to alleged constitutional violations such as those in *K.H. v. Morgan, supra, B.H. v. Johnson, supra*, and *Aristotle P. v. Johnson, supra*, and otherwise stay out of what is now a reasonably streamlined and publicly accountable chain of command in the distribution of child welfare and assistance benefits." (App. 30a (Manion, J., dissenting)).

(c) By converting state administrative and program actions into federal rights the opinion below subverts the purpose of the AAA to the detriment of the children served by the States

The creation of a right to "reasonable efforts" disrupts the delicate balance of federal and state interests in the AAA. The unfortunate result may be that although plaintiffs and the court

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[24]The court of appeals may have intended to draw a line between class actions to enforce the AAA and individual actions. However, under Fed. R. Civ. P. 23, plaintiffs may bring a class action only if each individual plaintiff could state a claim. *See, e.g., O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

below intended to assist abused and neglected children, the Court's holding may in fact subvert the AAA's primary purpose.

Congress intended that the AAA encourage innovation in child welfare practice.[25] S. Rep. No. 336, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. Code Cong. & Admin. News 1448, 1450. By creating a right to "reasonable efforts" and then looking to the State's own actions to determine what is "reasonable," the decision below creates disincentives for improvements in the child welfare system. If a State adopts progressive programs, or expands the provision of present services, advocates will assert that such programs are "reasonable" and therefore must continue (regardless of whether they work or are cost-effective) because they constitute a federal right.[26] States therefore will be reluctant to launch such new programs, and may even reduce current services, in order to avoid expansive liability under the "reasonable efforts" clause.

B. The AAA Provides A Comprehensive Enforcement Mechanism Thereby Foreclosing A Remedy Under Section 1983

Even if, *arguendo*, a federal right to "reasonable efforts" exists in the AAA, the statute nonetheless sets forth remedial devices

[25]This Court has long recognized that the States are the proper "laboratories" for crafting solutions to "difficult and sensitive problem[s]." *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2859 (1990) (O'Connor, J., concurring) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

[26]In fact, questions have been raised as to the wisdom and effectiveness of family preservation services developed under the AAA. *See*, Magura, *supra*, at 200 (concluding that it is "doubtful" that foster care prevention programs are less expensive than foster care); Wald, *Family Preservation: Are We Moving Too Fast?*, Public Welfare 33 (Summer 1988) (questioning development and direction of family preservation programs); Garrison, *supra*, at 1801-02 (citing significant problems with in-home service programs). The ability of States to respond to such questions and considerations will be greatly limited if children and parents are permitted to enjoin the modification or discontinuation of a program because it is construed to be a "reasonable effort."

"sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Middlesex County Sewerage Auth. v. National Sea Clammers Assoc.*, 453 U.S. 1, 20 (1981).

As set forth in Part I.A.2.(b) above, Section 672(a) of the AAA specifically provides for a state court judicial determination that "reasonable efforts" were made, in the context of also considering the welfare of the child and the risk of harm at home. 42 U.S.C. § 672(a)(1). *See also* § 675(1) (defining required "case plan" describing for each child the services "provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, [or] facilitate return of the child to his own home"); (5)(B) (requiring review of child's case plan at least once every six months by a court or administrative body); (C) (requiring procedural safeguards including "dispositional hearing to be held, in a family or juvenile court or another court . . . or by an administrative body appointed or approved by the court, no later than eighteen months after the original placement. . . .").

The presence of explicit state judicial and administrative enforcement mechanisms distinguishes the AAA from the Boren Amendment. *See Wilder*, 110 S. Ct. at 2524 (the "Medicaid Act contains no . . . provision for private judicial or administrative enforcement"). Instead, the AAA's enforcement scheme more closely resembles that under the Education of the Handicapped Act ("EHA"), which this Court found sufficiently comprehensive to foreclose Section 1983 actions in *Smith v. Robinson*, 468 U.S. 992, 1003 (1984). The EHA explicitly authorized a direct private right of action. *Id.* The AAA goes even further by requiring judicial review of "reasonable efforts" prior to custody in every child's case. *See* 42 U.S.C. § 671(b).[27]

[27]In addition, the AAA reinforces this mandatory judicial review with numerous administrative enforcement options. Section 671(b) empowers the Secretary to withhold funds otherwise allocated to a State when that

(Footnote continued)

Given the AAA's comprehensive enforcement framework, Section 1983 should not be allowed to supplant intentional omissions from that scheme. *Smith*, 468 U.S. at 1003. Instead, the Court should recognize that the AAA is fully consistent with the federal courts' traditional deference to specialized state courts in matters of child welfare.

II.

CONGRESS DID NOT INTEND TO CREATE AN EXPANSIVE IMPLIED PRIVATE RIGHT OF ACTION FOR "REASONABLE EFFORTS"

The court below also found that plaintiffs could enforce Section 671(a)(15) directly.[28] (*See* App. 14a-18a). The court of appeals ac-

(Footnote 27 continued from previous page)
State is out of compliance with the statute. Interested individuals may participate in administrative hearings regarding compliance by a State. 45 C.F.R. § 213.15(b). Section 671(a)(12) requires that state plans filed with the Secretary provide "for granting an opportunity for a fair hearing before the State agency to any individual whose claim for benefits available pursuant to this part is denied or is not acted upon with reasonable promptness."

[28]Plaintiffs suggest in their Brief in Opposition to the Petition that defendants have waived any challenge to the court of appeals' holding that the "reasonable efforts" clause authorizes an implied private right of action. (Brief in Opposition at 16-18). However, the Petition specifically challenges the court's finding on this point, and preserves the issue for the brief on the merits without cluttering the Petition with overlapping questions. (Petition at 7 n.1). Although the burden of proof differs between Section 1983 and implied private rights of action, the analysis is strikingly similar. *See, e.g., Wilder*, 110 S. Ct. at 2526 (Rehnquist, C. J., dissenting) ("significant area of overlap" exists between Section 1983 and *Cort v. Ash* analysis; in both cases, "the language used by Congress must confer identifiable enforceable rights"); (App. 15a (*Cort v. Ash* analysis "closely resembles" Section 1983 analysis; only burden of proof differs)). (*Cf.* App. 42a (it "would be anomalous" to reach different results under the two standards)).

(Footnote continued)

knowledged that the *Cort v. Ash* test[29] "closely resembles" the Section 1983 analysis, except that plaintiffs bear the burden of proving each element of the *Cort* test. (App. 15a). Given that the court of appeals found enforceable rights under Section 1983, the court felt no need to undertake the full *Cort* analysis. In fact, both holdings are erroneous, for the reasons set forth in part I.A., above.

The central inquiry under *Cort* is whether Congress intended to create a private cause of action either directly or by implication. *Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11,

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(Footnote 28 continued from previous page)

Plaintiffs' hypertechnical approach would require petitioners to load petitions with restatements of closely related questions. Supreme Court Rule 14.1 specifically admonishes the parties to avoid unnecessary or repetitious questions, and states that the Court will consider questions "fairly included" within the questions in the Petition. Given that admonition, and the substantial similarity between the inquiries under Section 1983 and *Cort v. Ash*, 422 U.S. 66 (1975), petitioners chose specifically to preserve this issue, fairly subsumed in question 1 of the Petition, in the body of the Petition. *See, e.g., Peters v. Kiff*, 407 U.S. 493, 495 (1972) (holding that question was not waived where raised below, presented in the body of petition, and where opposing party had opportunity to respond to the question); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 246 n.12 (1981); *see also Olmstead v. United States*, 277 U.S. 438, 466 (1928).

[29]Both parties and the courts below agree that the standard announced by this Court in *Cort v. Ash*, 422 U.S. 66 (1975), governs implication of a private right of action:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted", . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And, finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations omitted) (emphasis in original).

23-24 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979).[30] The AAA contains no express grant of a private right of action. Nothing in the AAA or its legislative history provides the evidence of congressional intent required before the Court will create such a right by implication.

The court below accepted the district court's reasoning that, because some courts have found a private right under Section 671(a)(16) of the AAA, the case plan and case review provision, Section 671(a)(15) is likewise enforceable. (App. 17a (citing *Lynch v. Dukakis*, 719 F.2d 504)). That holding disregards the clear distinction Congress drew when it chose to explicitly define the case plan and case review requirement. 42 U.S.C. §§ 675(1), (5). *See* Part I.A.2.(b) above.

Indeed, the AAA's sponsor specifically stated that Congress intended to "leav[e] to the discretion of the States the precise mechanisms for protecting the rights of persons in the foster-care system." 125 Cong. Rec. 22685 (1979) (remarks by Sen. Cranston). Given that indication that Congress did not intend to create privately-enforceable rights, the holding to the contrary is plainly erroneous. Whatever Congress may have intended with respect to case plans and case reviews, plaintiffs cannot show that Congress intended to create a private right of action to obtain "reasonable efforts."

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[30]In *Wilder*, this Court recently reemphasized that the *Cort* "test reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes." *Wilder*, 110 S. Ct. at 2517 n.9. Because of that concern, the Court has been extremely reluctant in recent years to infer private rights of action from congressional silence. *See Thompson v. Thompson*, 484 U.S. at 190 (Scalia, J., concurring in the judgment) ("The recent history of our holdings is one of repeated rejection of claims of an implied right. This has been true in 9 of 11 recent private right of action cases heard by this court.").

Nor can plaintiffs satisfy the final two *Cort v. Ash* prongs. Implication of a private right of action to enforce Section 671(a)(15) is not "consistent with the underlying purposes" of the AAA, *Cort*, 422 U.S. at 78, because the implication of private rights upsets the careful balance of federal and state power implicit in the statute and effectively federalizes the law of child welfare, a result not contemplated by Congress. *See* Part I.A.3., above.

Likewise, this "cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States." *Cort*, 422 U.S. at 78; *see also Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 541 (1984) (relying on fourth *Cort* prong to find no implied right of action by investment company under Investment Company Act). As discussed above, this Court has consistently recognized that child welfare and family law are primarily matters of state concern. Thus, plaintiffs have not met the heavy burden for creation of sweeping new substantive rights from congressional silence.

III.

IN THE ABSENCE OF PROVIDING FEDERAL FUNDS FOR SERVICES TO CHILDREN WHO ARE NOT IN FOSTER CARE, CONGRESS COULD NOT HAVE INTENDED TO CREATE A FEDERAL RIGHT UNDER TITLE IV-E TO SUCH SERVICES

As discussed in Part I above, the cornerstone of *Pennhurst* is that federal-state cooperative funding statutes are "contracts" between Congress and the States: "[I]n return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst*, 451 U.S. at 17. However, if Congress intends to impose such conditions, "it must do so unambiguously," *id.*, "since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." *Id.* at 16-17.

In this case, the court below held that a federal right to "reasonable efforts" under Title IV-E existed not only on behalf of children in federally-funded foster care, but also on behalf of children who are at home with their families, who receive no services funded under Title IV-E. The court's analysis of this point, in its entirety, states:

> As Judge Shadur explained in analyzing the relevant provisions of the AAA, the language of that statute does not reveal an intention by Congress to limit its terms only to children actually in foster care outside the home, *Artist M.*, [App. 39a-40a], and the DCFS fails to provide a compelling reason to read such a distinction into the statute.

(App. 18a).

The "compelling reason" is plain on the face of the statute. Section 670 of the AAA declares that the "purpose" of Title IV-E is to "enabl[e] each State to provide, in appropriate cases, foster care and transitional living programs for children . . . and adoption assistance for children with special needs. . . ." 42 U.S.C. § 670. The statute goes on to specify that federal funds are available under Title IV-E for "foster care maintenance payments" made on behalf of children who reside in a "child care institution" or a "foster family home." 42 U.S.C. § 672. No mention is made of any Title IV-E funds for services or programs to children residing at home.[31]

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[31]In the Seventh Circuit and in their Brief in Opposition to the Petition, plaintiffs cite provisions contained in Title *IV-B*, 42 U.S.C. §§ 620-28, in support of their argument that children at home have enforceable rights under Title *IV-E*. (Brief in Opposition at 26). Section 671(a)(15), the provision that plaintiffs seek to enforce, is contained in Title *IV-E*, *not* Title *IV-B*. The two titles are distinct programs, a fact plaintiffs recognized in the district court where they expressly waived any reliance on Title IV-B in bringing this suit. (*See* R.60 at 20 n.8). Moreover, it is clear under the terms of Title IV-B that Congress intended those provisions to serve simply as "congressional 'encouragement' of state programs [rather than] the imposition of binding obligations on the States."

(Footnote continued)

In *Pennhurst*, this Court rebuffed a similar invitation to create rights where Congress provided no funding:

> The fact that Congress granted to Pennsylvania only $1.6 million in 1976, a sum woefully inadequate to meet the enormous financial burden of providing "appropriate" treatment in the "least restrictive" setting, confirms that Congress must have had a limited purpose in enacting § 6010. *When Congress does impose affirmative obligations on the States, it usually makes a far more substantial contribution to defray costs.*

Pennhurst, 451 U.S. at 24 (emphasis added).[32] The holding in this case to the contrary, permitting children living at home to individually enforce provisions of Title IV-E, fundamentally alters the basic tenets of enforceable rights law.

(Footnote 31 continued from previous page)
Pennhurst, 451 U.S. at 27. For example, the purpose of Title IV-B, as distinct from Title IV-E, is set forth as "enabling the United States, through the Secretary, to *cooperate* with State public welfare agencies in *establishing*, *extending* and *strengthening* child welfare services. . . ." 42 U.S.C. § 620(a) (emphasis added). "Child welfare services" are defined under Title IV-B as "public social services which are directed toward the accomplishment" of a list of ambitious "purposes," such as "protecting and promoting the welfare of all children," "preventing or remedying . . . the neglect, abuse, exploitation or delinquency of children," and "preventing the unnecessary separation of children from their families." 42 U.S.C. § 625(a)(1). As the court in *B.H. v. Johnson* found in distinguishing Titles IV-B and IV-E, "Congress intended Title IV-B to be an expression of goals and guiding principles rather than an enactment that creates enforceable federal rights." 715 F. Supp. at 1401.

This conclusion is reinforced by the fact that Congress has appropriated only $325 million nationwide to fund Title IV-B. 42 U.S.C. § 620(a). By contrast, the appropriation in fiscal year 1991 for children and family services in Illinois alone was nearly $500 million. 1990 Laws of Illinois 86-1142; 1991 Illinois Legislative Service 87-2, 87-6 (West).

[32]This Court in *Wilder* also recognized the importance of considering the amount of federal funds a state receives, noting that "the Federal Government provides funds to cover between 50% and 83% of the cost of patient care." *Wilder*, 110 S. Ct. at 2518 n.10. Medicaid reimbursement for 1988 totaled $29 billion. *Id.* It was such costs that the Boren Amendment required be reimbursed to medical facilities at "reasonable and adequate" rates.

The absence of any basis for this ruling in Title IV-E itself[33] is evidenced by the arbitrary distinction applied by the courts below between children residing at home under Juvenile Court orders, who may enforce the AAA, and other children living at home served by DCFS, who may not.[34] That distinction draws no support from the AAA, which never mentions juvenile court protective orders.

The district court suggested that DCFS distinguishes such children by petitioning for court orders. (App. 40a n.7). However, under Illinois law it is the State's Attorney,[35] not DCFS, that files petitions alleging a child may be abused, neglected or dependent. *See* Illinois Juvenile Court Act § 2-13, Ill. Rev. Stat. ch. 37, ¶ 802-13 (*See also* 1/17/89 Tr. at 275 (testimony that the State's Attorney, not DCFS, determines whether to seek a protective or supervision order)). Indeed, the Juvenile Court Act provides that "*[a]ny* adult person, any agency or association . . . or the court on its own motion" may direct such a filing through the State's Attorney. *Id.* (emphasis added).[36]

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[33]The mere fact that Section 671(a)(15) *refers* indirectly to children not yet in foster care does not mean that Congress intended for those children to have a right to sue under the AAA. *See, e.g., Pennhurst*, 451 U.S. at 24.

[34]In Cook County, approximately 15% of new cases involved children in DCFS custody and placed in foster care or other substitute care placement; 8% were children being served in their own homes under a juvenile court protective or supervision order; and the remaining three quarters were children being served in their own homes with no court order at all. (1/17/89 Tr. at 260-64).

[35]In Illinois, the State's Attorney is the county prosecutor in all civil and criminal suits, indictments, and prosecutions. *See* Counties Code § 3-9005(1), Ill. Rev. Stat. ch. 34, ¶ 3-9005(1). *See generally* Ill. Const. Art. 6, § 19; Counties Code §§ 3-9001-3-9012, Ill. Rev. Stat. ch. 34, ¶¶ 3-9001-3-9012.

[36]After a petition is filed, but before an adjudication is reached that a child is in fact abused, neglected or dependent, the juvenile court (not DCFS) may allow a child to remain at home and continue the case

(Footnote continued)

Moreover, the AAA is a federal statute that must be applied consistently in the several States, while protective orders mean different things in different States, and even in different counties within Illinois. The issue is not whether a distinction can be drawn, but whether such a distinction is justified under the language of the federal statute.[37] The strained effort to craft a wholly arbitrary line without any basis in the AAA's language, structure, history, or regulatory scheme demonstrates the extent to which the court below stretched the enforceable rights analysis beyond its boundaries.

(Footnote 36 continued from previous page)
under court supervision, Juvenile Court Act § 2-20, Ill. Rev. Stat. ch. 37, ¶ 802-20, or, following an adjudication, the juvenile court (not DCFS) may release the child to his parents subject to an order of protective supervision. Juvenile Court Act §§ 2-23(b)(2), 2-24, 2-25, Ill. Rev. Stat. ch. 37, ¶¶ 802-23(b)(2), 802-24, 802-25. Nothing in the Juvenile Court Act specifies that it is DCFS that supervises all such children at home under court order; indeed, Section 2-24 regarding protective supervision states that the parents, or other private individual with custody of the child, may be placed under the supervision of the *probation office*. In Cook County, the informal practice has developed to provide in certain protective and supervision orders that DCFS shall report to the court on the child and family; however there is no statutory authority defining when or how such designations shall occur.

[37]Even if the distinction had support in the AAA itself, an arbitrary decision to deprive children residing at home of a federal right, solely because those children are not served by the States pursuant to a court order, might run afoul of the equal protection clause. *See, e.g., United States Dep't of Agriculture v. Molero*, 413 U.S. 528 (1973) (holding that classification scheme of Food Stamp Act was not "rationally related to a legitimate governmental interest"). Even within Cook County itself, the presence or absence of a court order often bears little relationship to the need for preventive services. (*See* 1/17/89 Tr. at 261). Thus, the line mandated by the courts below arguably bears no rational relationship to the AAA's purposes.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioners Sue Suter and Gary T. Morgan respectfully ask that this Court reverse the decision of the United States Court of Appeals for the Seventh Circuit, and remand for dismissal of the case.

Dated: July 18, 1991

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QUESTIONS PRESENTED

Through the Social Security Act, 42 U.S.C. § 301 *et seq.*, each State receives substantial federal funding for child welfare services on the condition that it have a plan "in effect in all subdivisions of the State," 42 U.S.C. § 671(a)(3), which:

> provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

Id. at § 671(a)(15). The questions presented in this case are:

1. Whether, under 42 U.S.C. § 1983, federal courts are competent to determine that the State of Illinois has no plan in effect to make the "reasonable efforts" required by 42 U.S.C. § 671(a)(15), when Illinois has systematically failed to provide children with caseworkers, who are necessary for the State to make *any* efforts to maintain or reunite them with their families; and

2. Whether the State of Illinois may disregard Congress' decision to condition federal funding under 42 U.S.C. §§ 670-676 and companion provisions of the Social Security Act on the State's making reasonable efforts to keep children out of foster care, when Illinois is eligible for and has voluntarily accepted substantial funding under these provisions to provide services to keep families together.

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BRIEF OF RESPONDENTS

STATUTES INVOLVED

1. The Adoption Assistance and Child Welfare Act of 1980, 94 Stat. 500, 42 U.S.C. §§ 620-628, 670-679a (codified as Title IV-B and Title IV-E of the Social Security Act), states in pertinent part:

> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—
>
> * * * *
>
> (3) provides that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; [and]
>
> * * * *
>
> (15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home. . . .

42 U.S.C. § 671(a)(3), (15).

2. 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

I. Introduction

Plaintiffs Artist M., Sarah B., Claude F., Algienan G., Myron C., Willie M., Amber B., and the class they represent are abused and neglected children who have been placed under the care or supervision of the Illinois Department of Children and Family Services (DCFS). Plaintiffs here challenge DCFS's systemic failure to meet its obligation to have a plan in effect to provide reasonable efforts to preserve or reunite them with their families, as required under the Adoption Assistance and Child Welfare Act of 1980, 94 Stat. 500, 42 U.S.C. §§ 620-628, 670-679a (the AACWA or the Act).

Through the AACWA, Congress created two federal-state cooperative programs, codified as Title IV-B and Title IV-E of the Social Security Act, which, along with Title IV-A, 42 U.S.C. §§ 601-617, provide extensive federal funding to participating States for the improvement of their child welfare systems. The AACWA was enacted:

> to require States to make critically needed improvements in their foster care programs [and] . . . to provide children and families with improved protection against unwarranted removal of children from their homes and added protection against inappropriate and unnecessarily prolonged foster care placement.

H.R. Rep. No. 136, 96th Cong., 1st Sess. 46 (1979).

The primary requirements of Title IV-E are contained in 42 U.S.C. § 671, which states in part:

> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them . . . [and which] provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home. . . .

42 U.S.C. § 671(a)(3), (15). States must also comply with this requirement in order to receive federal funding under Title IV-A. 42 U.S.C. § 602(a)(20).

Congress' mandate that participating States make reasonable efforts to preserve and reunite families is at the heart of the AACWA. For example, the AACWA requires a State court to determine whether the participating State has made reasonable efforts of the type described in § 671(a)(15) whenever the State seeks to remove a child from his or her home. 42 U.S.C. § 672(a)(1). In addition, 42 U.S.C. § 671(a)(16) requires the State to provide a case plan for each child in its care, describing the:

> services [to be] provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, [and] facilitate return of the child to his own home or the permanent placement of the child.

42 U.S.C. § 675(1)(B). The case plan must also describe the State's efforts prior to that time to preserve or reunite the family. 45 C.F.R. § 1356.21(d)(4). Each case plan must then be reviewed periodically in order to assess the progress toward remedying the conditions which led to the child's removal from his or her family and to consider the prospects for the child's return. 42 U.S.C. § 675(5)(B). Finally, under 42 U.S.C. § 671(b), the Secretary of Health and Human Services (the Secretary) is required to suspend or reduce Title IV-E payments to any State that substantially fails to implement a plan to make reasonable efforts. *See also* 42 U.S.C. § 604(a) (similarly requiring suspension or reduction in Title IV-A payments).

As a participating State in Title IV-E and Title IV-A, Illinois must meet each of Title IV-E's requirements. To comply with the reasonable efforts requirements in § 671(a)(15), DCFS has designed a system which requires the assignment of a caseworker to each child. The caseworker must secure services to preserve the family, if it

is safe for the child to remain at home, or to reunify the family, if the child has been removed.

Defendants, however, fail to comply with the Act's mandate. The District Court found that they systematically fail to promptly assign caseworkers to plaintiffs and their families. As a result, defendants have no plan in effect to make reasonable efforts to maintain or to reunite children with their families, leaving the children at risk of further abuse or neglect and subjecting them to needless and unnecessarily long placements in foster care.

In order to vindicate their rights, plaintiffs brought this action, grounded in § 1983 and the Act itself. After a hearing on plaintiffs' motion for a preliminary injunction, defendants moved to dismiss the complaint. The District Court denied defendants' motion in part and ultimately entered a preliminary injunction. The Court of Appeals for the Seventh Circuit affirmed. This Court granted certiorari on May 13, 1991.

II. DCFS's Caseworker Assignment Policies and Practices

A. *The Vital Role of the Caseworker*

Plaintiffs are children who have been abused or neglected by their parents or whose parents are temporarily unable to care for them. J.A. 6, ¶ 3. In each of their cases, DCFS files a petition for adjudication of wardship in the Circuit Court of Cook County, Illinois, County Department, Juvenile Division ("Juvenile Court"). J.A. 33-34, ¶ 1. Based in part on the recommendations of investigators from the DCFS Division of Child Protection ("DCP"), the Juvenile Court then places many of these children in DCFS's custody. J.A. 34, ¶ 3. In nearly all of the remaining cases, the Juvenile Court orders DCFS to supervise the children in the custody of their parents ("protective order cases"). *Id.*

Defendants have assigned a very limited role to DCP investigators. They provide no family preservation, family reunification, or other services to children and their families. They only investigate reports of abuse and neglect. J.A. 34, ¶ 2. Instead, DCFS uses caseworkers—purport-

edly assigning a caseworker to every child—to fulfill its obligations to make reasonable efforts. Thus, when DCFS assumes custody of a child, it requires the caseworker first to find the child a safe temporary home—preferably with relatives—where reunification efforts can begin. J.A. 35, ¶ 4. The caseworker is then responsible for arranging visits with the child's parents and other members of the family, providing for counseling and other necessary services, and helping protect the child from further harm. *Id.* The caseworker must also prepare the written, individualized case plan required by the Act and to report on the condition of the child and the family to the Juvenile Court. *Id.* *See also* 89 Ill. Admin. Code § 305.11(a)(1).

Similarly, in protective order cases, defendants assign caseworkers the responsibility of securing services to help keep the family together. J.A. 36, ¶ 6. Thus, while the child remains at home, DCFS requires the caseworker to procure individual or family counseling, arrange homemaker services, provide substance abuse treatment, and in general, help the family provide for the needs of the child. *Id.* Perhaps most importantly, caseworkers are also responsible for monitoring the well-being of children to determine whether it is safe for them to remain at home. *Id.*

In both types of cases, it is crucial for defendants to assign caseworkers promptly. J.A. 37-38, ¶ 10. Because parents are most motivated to change during times of crisis, immediate intervention to preserve families is essential. *Id.* In custody cases, the likelihood that children will be reunited with their families is greatly increased when services are provided quickly. *Id.* The longer DCFS delays in providing such services during this critical period, the more likely it is that children will never be able to return home. *Id.* Similarly, DCFS's failure to provide prompt family preservation services quickly places children who remain at home at risk and often results in their unnecessary removal from their parents' custody. J.A. 38, ¶ 12. In short, under the system which defend-

ants designed, the State cannot fulfill the Act's reasonable efforts requirement without promptly assigning caseworkers.

B. *Defendants' Caseworker Assignment Practices at the Outset of this Case*

At the time plaintiffs filed their complaint, defendants regularly failed to assign caseworkers capable of initiating child welfare services for them and their families, both in protective order and custody cases. J.A. 39, ¶ 13. Defendants did not assign a caseworker to most children until at least two weeks after the first Juvenile Court date. *Id.* For many others they failed to assign a caseworker at all during the first 30 to 45 days. *Id.* In some cases children were without a caseworker for several months. J.A. 40, ¶ 17.

Moreover, in many cases when defendants finally assigned a caseworker, that assignment lasted only a short time. J.A. 39-40, ¶ 15. In other cases the assignments ended abruptly when defendants transferred or terminated caseworkers or when caseworkers took leaves of absence or resigned. J.A. 40, ¶ 16. In these cases DCFS simply failed to reassign a caseworker, leaving children without family reunification and family preservation services for months at a time. J.A. 39-40, ¶¶ 15-16.

By not assigning caseworkers, defendants provided no services to these abused and neglected children or their families. J.A. 37, ¶ 9. Young children removed from home were denied visits with their parents and siblings. *Id.* Other children were left in inappropriate placements such as shelters, even when appropriate relatives were willing to care for them. *Id.* Without a caseworker, many children were denied essential sex abuse treatment, grief counseling and psychiatric care. Still others remained in DCFS's custody indefinitely without any plan for their future. *Id.* Finally, without a caseworker to provide information, the Juvenile Court could not even contemplate returning these children home. *See* Ill. Rev. Stat. ch. 37, ¶¶ 802-10(2), 802-22, 802-23(1)(a), 802-28(3).

Likewise, children who remained at home under a court order requiring DCFS supervision were denied family preservation services and monitoring to ensure their safety when no caseworker was assigned. J.A. 38, ¶ 11. Without caseworkers, children who came under DCFS's supervision because their parents failed to provide adequate food continued to go hungry. *Id.* Parents who were willing to comply with a court order to obtain drug treatment received no assistance in locating and enrolling in a treatment program. *Id.* When no caseworker was assigned to visit the home, children were further abused and ultimately had to be removed from the custody of their parents. *Id.*

Despite their awareness of these problems, defendants did nothing to expedite the assignment of caseworkers to fulfill DCFS's obligation under the AACWA to make reasonable efforts to keep families together. J.A. 41, ¶ 18. Defendants simply failed to require DCFS personnel to assign cases promptly. *Id.* Defendants also failed to develop a policy or procedure for reassigning cases when caseworkers resign, transfer, or are absent for substantial periods of time. J.A. 41, ¶ 19. In fact, DCFS deliberately decided not to reassign many such cases. *Id.*

III. Proceedings in the Courts Below

On December 14, 1988, plaintiffs filed their complaint in the United States District Court for the Northern District of Illinois, alleging that defendants' failure to assign caseworkers to them promptly violated their rights, and those of similarly situated children, under the Act. J.A. 5-27. Plaintiffs sought declaratory and injunctive relief, pursuant to 42 U.S.C. § 1983 and through an implied cause of action under the Act. *Id.* A subclass of plaintiffs—those in DCFS's custody—also asserted that their rights under the Due Process Clause of the United States Constitution had been violated. *Id.* On the day they filed suit, plaintiffs also filed motions for class certification and for a preliminary injunction. R. 5, 7. The District Court exercised jurisdiction over the case pursuant to 28 U.S.C. §§ 1331, 1343, 2201, and 2202.

After granting the motion for class certification and expediting discovery, in January 1989, the District Court conducted a three day hearing on plaintiffs' motion for a preliminary injunction. Pet. App. 52a. The evidence revealed systemic problems in caseworker assignment, as described above, which resulted in the wholesale violation of plaintiffs' rights under the Act. *Id.* Plaintiffs also showed the harm suffered by individual children who were entrusted to DCFS's care and supervision. *Id.* In response, defendants' witnesses described their plan to reorganize the Department, purportedly to ensure prompt caseworker assignment. Pet. App. 34a, n.2.

The District Court initially accepted defendants' assurances that the reorganization plan would solve DCFS's caseworker assignment problems and deferred ruling on plaintiffs' motion for a preliminary injunction for well over a year. Pet. App. 52a. As time passed, however, it became apparent that the District Court's faith in defendants' plan had been misplaced. First, defendants continued to delay the assignment of caseworkers at the outset of cases on a regular basis. J.A. 43-44, ¶¶ 21-25. Second, defendants' heralded reorganization plan failed to address the gaps created when caseworkers resigned, transferred, were fired or took leaves of absence. J.A. 44-45, ¶ 26. Those reassignments which did occur were often illusory, as defendants regularly reassigned children's cases *en masse* to a single caseworker who, given the nature and volume of the reassignments, was not able to provide services to those children and their families. J.A. 45, ¶ 27. Finally, even after implementation of their plan, defendants failed to hold anyone in the agency accountable for assigning a caseworker promptly. J.A. 45-46, ¶¶ 28-29. Thus, despite the reorganization, defendants continued to deprive children and their families of caseworkers and the services and protections which, under DCFS's system, only the caseworkers could provide.

In the face of these problems, defendants filed a motion to dismiss the complaint. R. 53. On November 21, 1989, the District Court granted the motion only as it related

to plaintiffs' constitutional claims. Pet. App. 50a. The District Court denied the motion in all other respects, holding that plaintiffs had stated a cause of action under the AACWA—both through an implied cause of action and under § 1983. Pet. App. 35a-44a. Nevertheless, the District Court continued to defer to defendants' reorganization plan and invited them to apprise the court of any progress in its implementation. Pet. App. 50a.

Defendants, however, made no progress. They continued to deprive children of caseworkers for extended periods of time through the beginning of 1990. J.A. 46-48, ¶¶ 30-36. Finally, the District Court concluded that the reorganization plan had failed to bring defendants into compliance with the AACWA. Based on evidence it had received over the previous 14 months, on March 2, 1990, the Court entered a preliminary injunction, prohibiting defendants from:

> (a) failing to assign a caseworker capable of providing child welfare services to each of the plaintiffs and their families within three working days of the time that plaintiffs['] cases are first heard in Juvenile Court; and
>
> (b) failing to assign a caseworker capable of delivering child welfare services within three working days of the time that a previously assigned caseworker relinquishes responsibility for any portion of a case.

Pet. App. 56a. In issuing this injunction, the District Court preserved the central role of the caseworker in DCFS's plan and used the time frames which DCFS itself had established for caseworker assignment. J.A. 48, ¶ 37. Defendants then appealed.

The Court of Appeals for the Seventh Circuit affirmed the District Court in an opinion entered on October 29, 1990. The Court first held that plaintiffs could enforce the AACWA, both through an implied cause of action under the Act and under § 1983. Pet. App. 6a-18a. It then ruled that § 671(a)(15) required DCFS to make reasonable efforts on behalf of children who remain at home under court supervision. Pet. App. 18a. Finally,

the Court upheld the injunction as fully supported by the evidence. Pet. App. 18a-20a. On December 20, 1990, the Court of Appeals denied defendants' petition for rehearing. R. 138.

SUMMARY OF THE ARGUMENT

In order to receive federal funding under Title IV-E or Title IV-A, Illinois must develop and implement a plan which:

> provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

42 U.S.C. § 671(a)(15). *See also id.* at § 602(a)(20). The test for determining whether this provision creates a right enforceable under § 1983 is well established:

> [The] inquiry turns on whether the provision in question was intended to benefit the putative plaintiff. If so, the provision creates an enforceable right unless it reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the governmental unit, or unless the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce.

Wilder v. Virginia Hospital Association, 110 S. Ct. 2510, 2517 (1990) (internal quotations and citations omitted); *see also Dennis v. Higgins*, 111 S. Ct. 865, 871-72 (1991); *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444, 448 (1989).

The AACWA's requirement that States implement a plan to make reasonable efforts to preserve and reunite families meets each of these tests. Congress intended to benefit children like the plaintiffs through this provision and clearly imposed a binding obligation on the States to make reasonable efforts. Defendants do not dispute either of these facts. But in an effort to frustrate Congress' in-

tent to protect these children and to escape their clear-cut duty, defendants argue that the federal courts are incompetent to enforce the AACWA. Defendants' argument is meritless.

The reasonable efforts requirement is sufficiently specific to be judicially enforceable, a conclusion compelled by *Wilder* and by *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987). As the District Court demonstrated here, a federal court can readily determine that defendants systematically fail to assign caseworkers. Without caseworkers, defendants make no efforts, let alone reasonable ones, to preserve and reunify plaintiffs' families. Consequently, the court could only conclude that defendants have violated their obligations under the AACWA. In nearly 200 pages of briefs, defendants and amici supporting them utterly fail to show how the supposedly vague and amorphous reasonable efforts clause can be construed in any other way here.

Federal courts are fully accustomed to enforcing reasonableness requirements, and federal regulations and state court cases buttress their ability to do so here. They also provide whatever benchmark may be necessary under *Wilder* to enforce § 671(a)(15) in other cases. Finally, neither 42 U.S.C. § 671(b) nor § 672(a)(1) creates a sufficiently comprehensive remedial mechanism to preclude enforcement of the reasonable efforts requirement under § 1983. *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981). Accordingly, under the reasoning in *Dennis*, *Wilder* and *Golden State*, plaintiffs may enforce the reasonable efforts requirement through § 1983.

Likewise, the courts below correctly applied the analysis in *Cort v. Ash*, 422 U.S. 66 (1975), to conclude that a private right of action exists directly under the Act. Legislative intent is the most important factor in the analysis, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979), and it is clear from the legislative history here that Congress intended to create a private remedy under the AACWA.

Children who remain at home are equally entitled to enforce the reasonable efforts requirement. Illinois, like other participating States, receives substantial funding under Title IV-E, Title IV-A, and other provisions of the Social Security Act, which it uses to provide child welfare services to all abused and neglected children, including those who remain with their families under the court-ordered supervision of DCFS. By the plain language of § 671(a)(15), Congress made it abundantly clear that participating States must make reasonable efforts to keep children at home.

Finally, defendants' "floodgates" argument provides no legal or rational basis for this Court to ignore the plainly expressed intent of Congress. Defendants contend that enforcement of § 671(a)(15) will improperly burden the federal courts, both by increasing the number of cases under the AACWA and by requiring federal courts to adjudicate cases which defendants prefer to leave to state court judges. These concerns are contrived, as the flood of litigation simply has not materialized in the eleven years since the Act was passed, nor is it likely to commence now. Moreover, the deferential standard of review required under *Wilder*, 110 S. Ct. at 2523 n.18, provides ample protection to the States against that possibility and leaves States substantial discretion, consistent with Congress' intent, to develop child welfare programs to meet their needs, the needs of their citizens, and the requirements of the Act. Procedural hurdles, such as collateral estoppel and abstention, will also regularly preclude individual children or families from challenging decisions made in individual cases.

Congress never intended to permit States to accept federal funding while disregarding the Act's mandate, as Illinois seeks to do here. Congress made the reasonable efforts requirement the touchstone of the Act. Consequently, federal courts must remain open to vindicate the rights of abused and neglected children to reasonable efforts to keep their families together.

ARGUMENT

I. THROUGH § 1983, PLAINTIFFS MAY ENFORCE THE AACWA'S REQUIREMENT THAT STATES MAKE REASONABLE EFFORTS TO PREVENT OR ELIMINATE THE NEED TO REMOVE CHILDREN FROM THEIR HOMES AND TO MAKE IT POSSIBLE FOR THEM TO RETURN TO THEIR FAMILIES.

In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court held that § 1983 provides a remedy for the violation of federal statutes. Since that time, this Court has crafted only two exceptions to the broad scope of § 1983:

> A plaintiff alleging a violation of a federal statute will be permitted to sue under § 1983 unless "(1) the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983," or (2) "Congress has foreclosed such enforcement of the statute in the enactment itself."

Wilder, 110 S. Ct. at 2517, *quoting Wright*, 479 U.S. at 423; *see also Golden State*, 110 S. Ct. at 448 (1989). Neither of these exceptions applies here. Therefore, this Court should rule that plaintiffs may enforce the Act's reasonable efforts requirement through § 1983 and affirm the decisions below.

A. The Act Unambiguously Grants Plaintiffs a Right to Reasonable Efforts to Preserve and Reunite Them With Their Families.

As with all cases of statutory construction, the "starting point must be the language employed by Congress." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). Under Title IV-E, the Federal Government provides financial assistance to States to help them "provide, in appropriate cases, foster care and transitional independent living programs . . . , and adoption assistance." 42 U.S.C. § 670. Participation by Illinois and other States is purely voluntary, but once a State elects to participate, it must adhere to the terms which Congress has

established for the program. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

The requirements pertinent to this case are contained in 42 U.S.C. §§ 671(a)(3) and (15), which state:

> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them . . . [and which] provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home. . . .

With this language Congress imposed an explicit condition on a State's eligibility to receive funding. *Pennhurst*, 451 U.S. at 23. In order to receive federal financial assistance, States must develop and implement a plan to make reasonable efforts to keep or to reunite children with their families.

This plain and unambiguous requirement creates an enforceable right for plaintiffs under § 1983. Their claim meets each of the three tests set out in *Golden State* and *Wilder*. First, the reasonable efforts requirement was intended for the benefit of children like the plaintiffs. *Wilder*, 110 S. Ct. at 2517; *Golden State*, 110 S. Ct. at 448. Second, more than "reflect[ing] merely a congressional preference for a certain kind of conduct," § 671(a)(15) creates a "binding obligation" on participating States. *Wilder*, 110 S. Ct. at 2517, *quoting Pennhurst*, 451 U.S. at 19. Finally, the "interest which the plaintiff[s] assert [is] not 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.'" *Golden State*, 110 S. Ct. at 448, *quoting Wright*, 479 U.S. at 431-32. The enforcement of plaintiffs' claim also comports with the policy considerations underlying these tests. Construing § 671(a)(15) to provide an enforceable right will come as no surprise to the States, *Pennhurst*, 451 U.S. at

25, and will give effect to the clearly expressed intent of Congress.

1. *Congress adopted the AACWA to benefit abused and neglected children.*

As the Court of Appeals correctly recognized, Congress enacted the AACWA and its reasonable efforts requirement to stop States from needlessly removing and keeping children from their families. Pet. App. 6a, 10a. While defendants ignore this prong altogether, *see, e.g.*, Brief at 16, the plain language of the Act, *supra* at 2-3, and its legislative history show that Congress enacted the AACWA to benefit children like the plaintiffs.

Prior to the AACWA's enactment in 1980, Congress provided open-ended federal funding for foster care through Title IV-A, as aid to families with dependent children. 42 U.S.C. § 608(a) (1976). Title IV-A contained only minimal protection against the unnecessary separation of children from their families and only minimal encouragement for their return home. Under Title IV-B the Federal Government also contributed little to the States for foster care prevention. S. Rep. No. 336, 96th Cong., 1st Sess. 11, *reprinted in* 1980 U.S. Code Cong. & Ad. News 1448, 1460. States, in turn, used most of the money they received under these provisions to provide foster care, allocating little to placement prevention and even less to family reunification. H.R. Rep. No. 136 at 28.

With a financial incentive to remove children from their homes and no countervailing requirement to provide family preservation and reunification services, States used foster care as the "remedy of first resort, rather than the solution that is employed when all else fails." 126 Cong. Rec. 14645 (June 13, 1980) (remarks of Rep. Conable). By 1979, half a million children had been separated from their families and "locked" in state foster care systems. 125 Cong. Rec. 29938 (October 29, 1979) (remarks of Sen. Cranston). Thousands of children languished in placements—many of dubious quality—with little or no

hope of ever returning to their families or finding another permanent home. S. Rep. No. 336 at 10-11. After describing the nation's foster care system as a "world of horrors," 125 Cong. Rec. 29546 (October 25, 1979), Senator Cranston, the Act's sponsor, stated:

> For far too many children, foster care has ceased to be a temporary, short-term child protection service and has been transformed into a form of long-term childhood imprisonment with the likelihood of a child returning to his or her home, or finding a new adoptive home, decreasing substantially as the months go by.

Id. at 29938 (October 29, 1979).

Congress saw the States' failure to provide, and its own failure to require, reasonable family preservation and family reunification services as the root of this Dickensian nightmare. The House Ways and Means Committee, for example, complained that States regularly housed children in "distant placements which effectively preclude [them] from maintaining communication, or, in many instances, any relationship with [their] famil[ies]," drastically reducing their chances of returning home. H. Rep. No. 136 at 48-49. Individual members of Congress echoed the Committee's concerns. *See, e.g.*, 125 Cong. Rec. 22117 (August 2, 1979) (remarks of Rep. Rostenkowski) ("[i]n a majority of the cases, there are little (sic) or no attempts to reunite the child with the natural family"); 126 Cong. Rec. 14767 (June 13, 1980) (remarks of Sen. Cranston) ("[f]ar too many children and families have been broken apart when they could have been preserved with a little effort").

Congress noted in particular that caseworker assignment problems were a key impediment to family reunification. Foreshadowing the problems which confront plaintiffs in this case, Senator Cranston explained that States regularly left children without caseworkers, setting them "adrift" or "losing" them in the foster care system. 125 Cong. Rec. 29938-39, 29941 (October 29, 1979).

Thus, where reunification could have otherwise been easily achieved, the lack of a caseworker often kept the child from going home. *Id.*

Congress sought to protect children from this harm by requiring participating States to develop and implement plans to make reasonable efforts to preserve and reunite families. Senator Cranston as its sponsor, described this requirement as "critical to our efforts to reform the foster care system." 125 Cong. Rec. 29939 (October 29, 1979). He later summarized the importance of the reasonableness efforts requirement:

> [T]he new provisions will require States to examine alternatives and provide, wherever feasible, home-based services that will help keep families together, or help reunite families. Of course, State child protective agencies will continue to have authority to remove immediately children from dangerous situations, but where removal can be prevented through the provision of home-based services, these agencies will be required to provide such services before removing the child and turning to foster care. These provisions, I believe, are among the most important aspects of this legislation.

126 Cong. Rec. 14767 (June 13, 1980).[1] *See also* 126 Cong. Rec. 14645 (June 13, 1980) (remarks of Reps. Conable and Rousselot); 125 Cong. Rec. 22116 (August 2, 1979) (remarks of Rep. Chisholm); *id.* at 22119 (August 2, 1979) (remarks of Rep. Dodd). In short, application of the first prong of the *Dennis-Golden State-Wilder* test unquestionably supports the conclusion that plaintiffs have an enforceable right under § 1983.

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[1] In interpreting a statute, courts should give substantial weight to the statements of its sponsor. *See Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

2. *Section 671(a)(15) imposes a binding obligation on participating States to make reasonable efforts to preserve families and to reunite children with their families after they have been removed.*

By accepting substantial federal funding under Title IV-E, Illinois has voluntarily entered into a contract with the Federal Government. In consideration of the nearly $70 million it receives annually, Staff of House Comm. on Ways and Means, 102d Cong., 1st Sess., *Overview of Entitlement Programs* 797 (Comm. Print 1991), Illinois has promised to comply with the conditions contained in Title IV-E. *Pennhurst*, 451 U.S. at 17. Illinois has also agreed to comply with those conditions by participating in Title IV-A. 42 U.S.C. § 602(a)(20). In particular, Illinois has agreed to have a plan which meets the requirements of 42 U.S.C. § 671(a). The reasonable efforts mandate is an express requirement of the State plan and an express condition of Illinois' contract. Congress' language could not be more clear: "*In order* for a State to be eligible for payments under [Title IV-E], it *shall* have a plan . . . which . . . shall be *in effect* . . . [and which] provides that, in each case, reasonable efforts *will* be made. . . ." 42 U.S.C. § 671(a)(3), (15) (emphasis added).

All nine Justices in *Wilder* agreed that States are obligated to implement Social Security Act requirements of the type at issue here. In his dissenting opinion, for example, Chief Justice Rehnquist began by stating that the Boren Amendment, which was at issue in that case, "*requires* States to reimburse Medicaid services providers using rates" formulated in accordance with the statute. 110 S. Ct. at 2525 (emphasis added).

Defendants themselves concede that § 671(a)(15) imposes a binding obligation on participating States to make reasonable efforts, describing it as "a point not at issue in this case." Brief at 17. The Solicitor General also admits that the reasonable efforts requirement is mandatory, not precatory. Brief at 13. Yet defendants, citing

Pennhurst, attempt to obscure this Court's remaining task —to determine the competence of courts to enforce § 671 (a)(15)—with assertions that the reasonable efforts requirement is not or could not be a part of their contract with the Federal Government. *See, e.g.*, Brief at 20-26. They claim that Congress could not have mandated that States make reasonable efforts when others dispute the wisdom of such a requirement. *Id.* Defendants' argument reflects a fundamental misunderstanding of the legislative process. Congress has already considered whatever difference of opinion may exist and has authoritatively resolved the issue by making reasonable efforts to preserve and reunite families an unconditional obligation for participating States.[2]

Defendants' reliance on *Pennhurst* is similarly misguided. In *Pennhurst*, the Court construed provisions of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 89 Stat. 486, 42 U.S.C. § 6000 *et seq.* (1976 ed. & Supp. III 1979) (the DDA). It concluded that the DDA's "bill of rights" section, 42 U.S.C. § 6010, did not create enforceable rights, because it was "hortatory, not mandatory." *Id.* The Court relied on the plain language of the DDA, noting that the statute did not condition funding upon a State's compliance with the findings. *Id.* at 23. By comparison, the Court noted that other sections of the DDA—42 U.S.C. §§ 6005, 6009, 6011, 6012, 6063, and 6067—imposed explicit conditions on the grant of federal funds. *Id.* The Court also observed that the Secretary lacked authority to terminate funding when States had failed to comply with § 6010, further supporting its view that § 6010 was unenforceable. *Id.* at 23-24.

Applying the Court's reasoning in *Pennhurst* here, Congress clearly imposed a binding obligation on the States.

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[2] Contrary to defendants' claim, Brief at 24-25, § 672(a)(1) does nothing to alter the mandatory nature of the reasonable efforts requirement. Indeed, Congress viewed the best interest inquiry required by that section as a means to ensure that States would make efforts to keep families together. *See, e.g.*, S. Rep. No. 336 at 15.

First, in § 671(a), Congress expressly conditioned a State's eligibility for federal funding on its adoption and implementation of the reasonable efforts requirement. Second, other requirements imposed on the States by the AACWA are based on the goal of family reunification, such as the case plan and case review requirements, *supra* at 3, and make no sense unless States are required to make reasonable efforts to return children to their families. *See Pennhurst*, 451 U.S. at 18 (statutory provisions to be construed only in context of entire Act).[3] Third, Congress has expressly directed the Secretary to withhold federal funding when States fail to adhere to § 671(a)'s requirements. 42 U.S.C. § 671(b). Thus, under *Pennhurst*, participating States are bound to make reasonable efforts in accordance with § 671(a)(15).[4]

Finally, Illinois' conduct in the wake of the AACWA's adoption lays to rest any suggestion that the State, in

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[3] Defendants tacitly concede that the case plan and case review requirements are enforceable. Brief at 44. But as the District Court stated:

> If those provisions suffice to grant private enforcement rights to the children for whom such case plan and case reviews are required, it seems only logical to draw parallel inferences from other requirements enumerated in the selfsame section[].

Pet. App. at 38a. The case plan and case review requirements only reflected Congress' dissatisfaction with States' performance under the less detailed case plan requirement that had been contained in Title IV-A. 125 Cong. Rec. 29939-40 (October 29, 1979) (remarks of Sen. Cranston). In contrast, under Title IV-A participating States had not been required to make reasonable efforts. Hence, Congress had no historical basis for assuming that States would disregard its new requirement and no reason to believe that the reasonable efforts mandate would require elaborate procedural details. Therefore, the Court should disregard defendants' comparison.

[4] By delaying § 671(a)(15)'s effective date to October 1, 1983, H.R. Conf. Rep. No. 900, 96th Cong., 2d Sess. 46, *reprinted in* 1980 U.S. Code Cong. & Ad. News 1561, 1567, Congress gave States more than three years to prepare for its implementation, providing even more evidence that its family preservation and reunification requirements are mandatory and not merely precatory. *Pennhurst*, 451 U.S. at 24.

accepting funding under the AACWA, was unaware of its obligation to make reasonable efforts. Like other participating States, Illinois has repeatedly affirmed that it is complying with the reasonable efforts requirement in the plans it has submitted for the Secretary's approval. *See, e.g.*, State Plan for Title IV-E of the Social Security Act: Foster Care and Adoption Assistance (October 25, 1988). Moreover, in 1987 the Illinois legislature enacted the Family Preservation Act, P.A. 85-985 (codified at Ill. Rev. Stat. ch. 23, ¶¶ 2057.4, 2058.2, 5005, 5006a and ch. 37, ¶ 802-10), which requires DCFS to provide family preservation services to families whose children have been removed or are at risk of being removed and to develop and implement a plan to make such services available throughout the State. Senator Carroll, the sponsor of the Family Preservation Act, stated:

> Th[e] services [required by the Family Preservation Act] would be provided . . . through the auspices of the Department of Children and Family Services and would allow Illinois to comply with Federal Law 96-272 which is a necessary element of receiving Federal funds for child welfare.

Transcription Debate, 85th General Assembly, June 24, 987, p. 185.[8]

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[8] Legislative activity in other States also confirms that Congress spoke with a clear voice when imposing the reasonable efforts requirement as a binding obligation on the States. Nearly all of the States, including most of those supporting defendants, have enacted legislation embodying the family preservation and reunification requirements of the Act, with the bulk of it adopted after 1980. *See, e.g.*, Ark. Code Ann. § 9-27-328 (Michie Supp. 1989); Cal. Welf. & Inst. Code § 11404 (West 1991); Del. Code Ann. tit. 29, § 9003(3) (Supp. 1990); Fla. Stat. Ann. §§ 39.402(2), (7), (8) (West Supp. 1991), 39.41(4), .422(1), .422(5) (West 1988); Ga. Code Ann. §§ 15-11-41(b), (c) (1990); Idaho Code §§ 16-1614(e)(2), (4) (Michie Supp. 1991); Ind. Code Ann. §§ 31-6-4-19(b) (Burns Supp. 1990), 31-6-11-10(b) (Burns 1987); Iowa Code Ann. §§ 232.52(6), .95(2)(a) (West 1985), 232.102(5)(b) (West Supp. 1991); Kan. Stat. Ann. §§ 38-1542(f), -1563(h) (1986); Ky. Rev. Stat. § 620.140 (1)(c) (Michie 1990); La. Code Juv. Proc. Ann. art. 87(F) (West

Thus, with full knowledge of the Act's requirements, Illinois has accepted millions of dollars in federal funding and has agreed to a role for the Federal Government in its child welfare system. Defendants cannot now disregard their end of the bargain. They are obligated to make reasonable efforts.

3. *Section 671(a)(15) is neither too vague nor too amorphous for a court to enforce.*

Having satisfied the first and second prerequisites of *Dennis*, *Wilder*, and *Golden State*, plaintiffs' claim also meets the third and last test for the existence of a right under § 1983.[6] Like the reasonableness provision which

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1990); Me. Rev. Stat. Ann. tit. 22, § 4041(1)(A) (West Supp. 1990); Mass. Gen. Laws Ann. ch. 119, § 29C (West Supp. 1991); Minn. Stat. Ann. §§ 256.F.01(1), (2), 260.012 (West Supp. 1991); Miss. Code Ann. § 43-21-309(4), -405(6), -603(7) (Supp. 1990); Mo. Ann. Stat. § 211.183 (Vernon Supp. 1991); Neb. Rev. Stat. §§ 43-246(4), -254 (1988); Nev. Rev. Stat. Ann. §§ 432B.360(1)(a) (Michie 1986), .550(1) (Michie Supp. 1989); N.H. Rev. Stat. Ann. § 169-C:34(II) (1990); N.M. Stat. Ann. § 32-1-34(A) (Michie 1989); N.Y. Soc. Serv. Law § 358-a(1) (Consol. Supp. 1990), N.Y. Fam. Ct. Act § 352.2(2)(b) (Consol. Supp. 1990); Ohio Rev. Code Ann. § 2151.419 (Baldwin 1989); Okla. Stat. Ann. tit. 10, § 1104.1 (West Supp. 1991); Or. Rev. Stat. Ann. §§ 419.576(2)(c), .577 (3)(b) (Butterworth Supp. 1990); 62 Pa. Cons. Stat. Ann. §§ 2171-2175 (West Supp. 1990); Va. Code § 16.1-251(A)(2), -252(A) (Michie Supp. 1991), -279(A)(3)(c), -279(C)(5)(c) (Michie 1988); Wash. Rev. Code Ann. § 13.32A.170(1)(d), .34.060(8)(a), .34.130 (5)(b)(i) (West Supp. 1991); Wis. Stat. Ann. §§ 48.21(5)(b) (West 1987), 48.355(2)(b)(6) (West 1987 & Supp. 1989).

[6] Defendants and the Solicitor General encourage the Court in passing to add a fourth prerequisite for the existence of a right under § 1983. Relying on the dissenting opinion in *Wilder*, they suggest that other than filing and approval requirements, legislation enacted pursuant to the Spending Clause cannot create enforceable rights. Defendants' Brief at 19 n.7; Solicitor General's Brief at 12 n.6. The Council of State Governments, et al. (CSG), go even further afield, arguing that Congress can create no rights whatsoever through Spending Clause statutes. CSG Brief at 9-16.

Neither defendants nor the Solicitor General offers any reason whatsoever for overturning *Wilder* and countless cases enforcing "State plan" requirements in other federal-state cooperative pro-

this Court held to be enforceable in *Wilder*, the reasonable efforts requirement is sufficiently specific here to be judicially enforceable.

In *Wilder* the Court construed the Boren Amendment to the Medicaid Act, which requires States, as a condition of receiving federal funding for Medicaid, to reimburse providers using rates:

> which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access . . . to inpatient hospital services of adequate quality.

42 U.S.C. § 1396a(a)(13)(A) (1982 & Supp. V 1987). Dismissing the argument that the Boren Amendment was too vague and amorphous, this Court held that it created an enforceable right under § 1983. 110 S. Ct. at 2517-25. The Court reasoned:

> That the Amendment gives the States substantial discretion in choosing among reasonable methods of cal-

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grams or disregarding the plain language of § 1983. Indeed, *Dennis* thoroughly refutes the Solicitor General's suggestion that "intergovernmental arrangements," Solicitor General's Brief at 12 n.6, allocating rights and responsibilities between the States and the federal government cannot create enforceable rights. 111 S. Ct. at 870-72. Likewise, the CSG offers no basis for reversing *Maine v. Thiboutot*, in which the Court rejected a comparable limitation proposed for § 1983, 448 U.S. at 6-8, and held that private beneficiaries may enforce requirements imposed upon States by the Social Security Act. Moreover, this issue was never raised below, was not addressed in the petition, and is not even squarely presented in defendants' brief. Accordingly, this Court should adhere to the rule of *stare decisis* and apply the *Dennis-Wilder-Golden State* test in affirming the decision below. *See Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2370 (1989) (describing particularly heavy burden borne by party seeking "to overrule a point of statutory construction").

> culating rates may affect the standard under which a court reviews whether the rates comply with the Amendment, but it does not render the Amendment unenforceable by a court. While there may be a range of reasonable rates, there certainly are *some* rates outside that range that no State could ever find to be reasonable and adequate under the Act.

Id. at 2523 (emphasis in original).

Similarly, the AACWA gives participating States substantial discretion (though less than the Boren Amendment[7]) in developing and implementing a plan to make reasonable efforts in each case. In permitting discretion, however, Congress did not render the Act unenforceable under § 1983. *See also King v. Smith*, 392 U.S. 309, 318-19 (1968) (enforcing State's obligation to provide AFDC benefits, despite "States hav[ing] considerable latitude in allocating their AFDC resources"). While there may be a range of reasonable efforts which the States may employ to prevent foster care placement and to reunify foster children with their families, Illinois' practice of systematically depriving children of caseworkers clearly falls outside that range.

Finally, defendants' abstract discussion of the statute, which ignores the tragic consequences of their actions in this case, should be disregarded. As the Court made clear in *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988), apart from legislation involving capital punishment or threatening First Amendment interests, "[v]agueness challenges to statutes . . . are examined in light of the facts of the

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[7] Under the Boren Amendment, a participating State must reimburse Medicaid providers at rates which the State itself finds to be "reasonable and adequate." 42 U.S.C. § 1396a(a)(13)(A). By contrast, through the AACWA, Congress requires each participating State to make reasonable family preservation and reunification efforts without interposing the State as the sole judge of its efforts. Thus, the very plain language of § 671(a)(15) places no limitation on the right it confers—the right to a State plan providing for reasonable efforts. *Cf. Wilder*, 110 S. Ct. at 2527 (Rehnquist, C.J., dissenting).

case at hand; the statute is judged on an as-applied basis." *Id.* at 1858. *Accord United States v. National Dairy Products Corp.*, 372 U.S. 29, 31-33 (1963); *see also Lewis v. Continental Bank Corp.*, 110 S. Ct. 1249, 1253 (1990) (under case-or-controversy requirement, federal courts may not decide questions before them based on hypothetical situations).[8] As applied to the facts in this case, the reasonable efforts clause is sufficiently specific to be judicially enforceable.

a. *Enforcement of § 671(a)(15) is well within the competence of the judiciary, when, as a result of defendants' systemic failure to assign caseworkers promptly, Illinois fails to make any efforts to keep or to reunite children with their families.*

The District Court found that defendants must assign caseworkers to children in order to make *any* efforts to prevent or eliminate the need for placing them in foster care or to reunite foster children with their families. To use the Court of Appeals' description, the caseworker is a "lifeline" for the child. Pet. App. 12a. Defendants do not dispute this.

In protective order cases, DCFS must assign a caseworker to arrange the services necessary "to ease or eliminate the crisis that led to the child's mistreatment." J.A. 36, ¶ 6. A caseworker is necessary to procure counseling and homemaker services, substance abuse treatment programs, and other assistance for parents who need help to meet their children's basic needs. *Id.* The caseworker is also responsible for monitoring the child's safety to protect the child from the risk of further harm. *Id.* Similarly, a caseworker is essential in custody cases to fulfill

[8] Although the defendants in *Maynard* and *National Dairy* challenged the relevant statutes on constitutional grounds, the policy considerations discussed in those cases fully support enforcement of § 671(a)(15) as well, since defendants here clearly understood that their conduct was proscribed by the statute. *Maynard*, 108 S. Ct. at 1858; *National Dairy*, 372 U.S. at 32-33.

the State's responsibility to attempt to reunify children with their families. J.A. 35, ¶ 4. The caseworker alone arranges a placement for the child where reunification services can be provided, facilitates visitation, and develops a case plan. *Id.*

Without a caseworker, children who remain at home under DCFS supervision are denied services to prevent the need to remove them from their families. J.A. 38, ¶ 11. Some children are left hungry when no caseworker is assigned to help their parents find food. *Id.* Others are placed at risk when no caseworker is assigned to arrange for court-ordered drug treatment for their parents. *Id.* In some cases children continue to be severely abused when no caseworker is assigned to monitor their safety. *Id.* Defendants' failure to assign caseworkers promptly in protective order cases thus increases the likelihood that children will be removed from their homes. J.A. 38-39, ¶ 12.

By failing to assign caseworkers in custody cases, defendants prevent children who are placed in shelters, institutions, and foster homes from being returned to their families. These children are denied essential sex abuse treatment, counseling, and psychiatric care; they cannot visit their parents, brothers, or sisters; and they are deprived of a plan for family reunification, when defendants fail to assign them caseworkers. J.A. 37, ¶ 9.

In sum, under defendants' own system, when caseworkers are not assigned, DCFS can make no efforts, let alone reasonable ones, to preserve or to reunite children with their families.[9] Defendants argue that the District Court could not competently assess their compliance with the reasonable efforts requirement without looking

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[9] Professional standards in child welfare uniformly support the District Court's findings regarding the importance of caseworkers and the need for their prompt assignment. *See, e.g.*, Child Welfare League of America, *Standards for Services to Strengthen and Preserve Families with Children* § 2.44 (1989); E. Cole & J. Duva, *Family Preservation* 2 (1990); Child Welfare League of America, *Standards for Foster Family Service* §§ 3.4, 3.9, 4.27, 4.33 (1984).

at other aspects of the DCFS system. Brief at 29 n.16. But it was defendants who made caseworkers the undisputed linchpin of their plan to make reasonable efforts, as the District Court properly found. J.A. 35-39, ¶¶ 4-12.[10] *See generally Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985) (findings of fact by trial court to be afforded great deference on review).

There is nothing subjective about plaintiffs' need for caseworkers. Reasonable efforts cannot be made without them. Therefore, a court need only determine that caseworkers are not being assigned in order to find a violation of the Act—an "inquiry well within the competence of the judiciary," *Wilder*, 110 S. Ct. at 2523, as the District Court's findings show. *See, e.g.*, J.A. 39, ¶¶ 13-19. Similarly, defendants' complete reliance on caseworkers to fulfill the requirements of § 671(a)(15) makes it quite simple for a court to fashion appropriate and narrowly tailored relief for the class plaintiffs. *Cf. Wright*, 479 U.S. at 438 (O'Connor, J., dissenting).[11]

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[10] Taking a slightly different approach, the CSG argues that the District Court could not competently look at caseworker assignment in assessing what is reasonable since, in its view, States must be free to devote caseworkers to assist certain families while doing nothing on behalf of others. CSG Brief at 24-25. Besides distorting the facts of this case, *see, e.g.*, J.A. 39, ¶ 13, J.A. 44-45, ¶ 19, their argument ignores the plain language of the Act and the Secretary's interpretation of it, 48 Fed. Reg. 23107 (1983), both of which require the State's plan to provide that reasonable efforts will be made *in each case*.

Nor does defendants' use of caseworkers constitute an "enforcement decision." CSG Brief at 24. Having accepted Title IV-E funding, Illinois has no choice but to comply with the reasonable efforts mandate. *Supra* at 18-22. Consequently, the CSG's reliance on *Heckler v. Chaney*, 470 U.S. 821 (1985), is misplaced. Defendants' use of caseworkers here is no different from other agency actions, which courts are presumed competent to review. *See Traynor v. Turnage*, 108 S. Ct. 1372, 1378 (1988).

[11] Consistent with *Wilder*, the District Court employed an extremely deferential standard of review. First, the Court "deferred issuance of its post-hearing finding (sic) of fact and conclusions of law pending . . . DCFS' implementation of a restructuring plan

b. *Enforcement of the reasonable efforts requirement of § 671(a)(15) is fully supported by countless federal court cases enforcing reasonableness requirements in federal statutes.*

Federal courts have a long history of enforcing reasonableness requirements—including reasonable efforts requirements—in other federal statutes. In *Virginia Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937), for example, this Court applied § 2, First, of the Railway Labor Act, 44 Stat. 577, 45 U.S.C. § 152, which requires carriers and employees "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions." The Court held unequivocally that federal courts were fully competent to enforce such a requirement. Writing for the Court, Chief Justice Stone stated:

> There is no want of capacity in the court to direct complete performance of the entire obligation. . . . Whether an obligation has been discharged, and whether action taken or omitted is in good faith or

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directly addressing the delays in caseworker assignments." Pet. App. 33a-34a. Even after affirming that plaintiffs had stated a cause of action under the Act, the District Court requested a report regarding DCFS's reorganization plan to determine whether defendants had addressed the violations proved at the preliminary injunction hearing ten months earlier. Pet. App. 50a. All told, the District Court waited over a year after the hearing to enter the preliminary injunction.

Similarly, the District Court deferred to defendants in fashioning a remedy for their violations of the Act. The District Court relied heavily on DCFS's own system, under which caseworkers are essential to make efforts to preserve and reunify families. Pet. App. 16a-17a. The District Court also tailored its order to the goal which defendants themselves had established—caseworker assignment and reassignment within three days. J.A. 48, ¶ 37. The court thereby rejected the more restrictive relief originally sought by plaintiffs—initial assignment within 24 hours and continuous reassignment thereafter—as inconsistent with DCFS's capabilities, needs, and plan. *Id.* As the Court of Appeals stated, "the [D]istrict [C]ourt has . . . not attempted to fashion a remedy that interferes with the daily operation of the DCFS." Pet. App. 12a.

> reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees.

300 U.S. at 550. *See also Chicago & Northwestern Ry. Co. v. United Transportation Union*, 402 U.S. 570 (1971). Accordingly, this Court has construed and enforced reasonable efforts requirements embodied in other federal statutes and rules as well. *See, e.g., Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 77 (1977) (finding that employer had made "reasonable efforts" to accommodate the plaintiff's religious beliefs in accordance with 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1)); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-76 (1974) (enforcing "reasonable efforts" requirement in notice provisions of Fed. R. Civ. P. 23(c)(2)).

The Court has also unhesitatingly enforced other reasonableness requirements in federal statutes, even when litigants have challenged its competence to do so. In *Wright*, for example, this Court addressed the enforceability of a reasonableness requirement in regulations implementing the Brooke Amendment, 42 U.S.C. § 1437a (1982 & Supp. III 1985). The Court held that the regulations, which required public housing authorities to provide for "reasonable amounts of utilities" in calculating rents, 24 C.F.R. § 860.403 (1982), were judicially enforceable. 479 U.S. at 431-32. Moreover, only last term, this Court again confirmed that individuals may enforce reasonableness requirements in federal statutes and rules in the federal courts. *See, e.g., International Organization of Masters, Mates & Pilots v. Brown*, 111 S. Ct. 880 (1991) (enforcing requirement of 29 U.S.C. § 481(c) that union comply with all reasonable requests to distribute material for union election); *United States v. R. Enterprises*, 111 S. Ct. 722 (1991) (applying reasonableness requirement of Fed. R. Crim. P. 17(c) to grand jury subpoena).[12]

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[12] Decisions from last term also confirm that federal courts regularly and competently apply reasonableness requirements other than those contained in federal statutes. *See, e.g., Florida v. Jimeno,*

Finally, Congress has imposed reasonableness standards on States through other state plan-based provisions of the Social Security Act, and this Court has affirmed their enforceability, albeit in dicta. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 659 n.8 (1974) (affirming Court of Appeals' construction of "reasonable promptness" in 42 U.S.C. § 1382(a)(8)); *Jefferson v. Hackney*, 406 U.S. 535, 545 (1972) (construing 42 U.S.C. § 602(a)(10)'s "reasonable promptness" standard as barring "den[ial] of benefits[,] even temporarily, to a person who has been found fully qualified for aid"). In *Pennhurst* as well, this Court utilized 42 U.S.C. § 602(a)(10), including its reasonableness requirement, as a model of enforceability in a Spending Clause statute. 451 U.S. at 18.

Section 671(a)(15), as part of the Social Security Act, is equally enforceable. *See also Youngberg v. Romeo*, 457 U.S. 307, 322 (1982) (obligating States, through § 1983, to provide reasonable services to those in their care). Paraphrasing *Wilder*, "[a]lthough some knowledge of [child welfare] might be required to evaluate . . . the reasonableness of [a State's efforts], such an inquiry is well within the competence of the judiciary." 110 S. Ct. at 2523.

c. *State court enforcement of the reasonable efforts requirement, explicitly mandated in certain limited circumstances by 42 U.S.C. § 672(a)(1) and embraced by defendants, also confirms that courts are competent to enforce § 671(a)(15).*

Through 42 U.S.C. § 672(a)(1), state courts are obligated to ensure—albeit only in very limited circumstances, *infra* at 36-37—that the States make reasonable efforts to

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111 S. Ct. 1801 (1991) (determining search and seizure to be reasonable under Fourth Amendment); *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991) (construing forum-selection clause in contract to be reasonable and, hence, enforceable). Moreover, like the cases discussed in the text, these cases refute defendants' suggestion that federal courts are incompetent to assess the reasonableness of anything other than a numerical requirement.

preserve and reunite families. Defendants enthusiastically embrace state court enforcement of this requirement. Brief at 30 n.17. Indeed, in their view, § 672(a)(1) is sufficiently specific to preclude enforcement of § 671(a)(15) under *Sea Clammers*. Brief at 41. Yet defendants fail to show how the State's obligation to have a plan in effect to make reasonable efforts—the very requirement on which § 672(a)(1) is based—is any less specific.[13]

Unable to explain why § 671(a)(15) is any less enforceable, defendants and amici supporting them next attempt to distinguish the competence of the courts hearing claims under these two provisions. The Solicitor General, for example, argues that state courts alone are competent to make reasonable efforts determinations, because state court judges hearing abuse and neglect cases are supposedly "specialized." Brief at 25-26. He thereby misstates both the law and the facts in Illinois, where all trial courts are courts of general jurisdiction, *In re Greene*, 76 Ill. 2d 204, 213, 390 N.E.2d 884, 888 (1979), and only one county has judges who hear only abuse and neglect cases. *See* Circuit Court of Cook County General Order 1.2.

Defendants' suggested dichotomy becomes all the more untenable in light of the purpose of § 1983, which was enacted to provide a *federal court* remedy for violations of federal rights. *Patsy v. Board of Regents*, 457 U.S. 496, 502-05 (1982). Under defendants' proposal, individual plaintiffs would remain free to mount a § 1983 challenge to a State's plan to make reasonable efforts only in state courts,[14] because of their purported exclusive competence to address those issues.

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[13] Defendants' acceptance of class certification further undercuts their argument that the term "reasonable efforts" is sufficiently specific to be enforced only in individual cases. R. 10 at 1.

[14] On the other hand, if adopted by this Court, defendants' argument that the reasonable efforts requirement of § 671(a)(15) is too vague to be enforceable might lead state courts to conclude that they are incapable of making the reasonable efforts deter-

This Court should reject defendants' distinction. The federal courts, though courts of general jurisdiction, are capable of enforcing federal statutory requirements, including the requirement that participating States implement plans to provide reasonable efforts—particularly given Congress' forceful articulation of this guarantee.

d. *The history of the Act demonstrates that Congress intended § 671(a)(15) to be judicially enforceable.*

The legislative history shows not only the paramount importance of the Act's family preservation and family reunification requirements, *supra* at 15-17, but also Congress' intent that § 671(a)(15) be judicially enforceable. Congress enacted the AACWA shortly after this Court's decision in *Miller v. Youakim*, 440 U.S. 125 (1979), which enforced the State plan requirements relating to abused and neglected children in Title IV-A. Congress was well aware of that decision at the time the AACWA was enacted, 125 Cong. Rec. 29538 (October 25, 1979) (remarks of Sen. Cranston), and did nothing to limit its effect on the new statute. It thereby incorporated the enforceability of State plan requirements from the *Youakim* decision into the state plan requirements in Title IV-E. *See Pierce v. Underwood*, 108 S. Ct. 2541, 2551 (1988).

Senator Cranston's remarks provide further evidence that Congress intended for courts to have a role in enforcing § 671(a)(15). Describing the predecessor provisions in Title IV-A, Senator Cranston stated:

> These very generalized provisions have had little specific impact upon a State's responsibility to provide services designed to prevent a child's removal from his or her home, or to help alleviate the problem which caused the child's removal in the first place. Accordingly, some courts have specifically held that social services agencies had no affirmative duty to

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minations required by § 672(a)(1), thereby causing an even greater departure from the plain language of the statute.

> provide preventive services to a distressed family before the removal of a child.

126 Cong. Rec. 14767 (June 13, 1980). Section 671(a)(15) was enacted to remedy the courts' failure to enforce the earlier provisions:

> The Senate amendment provided specific requirements that States must include in their Title IV-E program plan provisions to assure that in each case reasonable efforts be made prior to the placement of a child in foster care to prevent or eliminate the need for removal of a child from his home and that reasonable efforts be made to make it possible for a child to return to his [home].

Id. Neither defendants nor amici supporting them present any legislative history to refute the evidence that Congress intended 42 U.S.C. § 671(a)(15) to be enforceable.

e. ***Federal regulations and state court cases provide objective benchmarks for determining whether a State has a plan in effect to make reasonable efforts to preserve and reunite families.***

Regulations promulgated by the Secretary of Health and Human Services describe specific services which a State may provide as part of its plan to help preserve and reunify families under the reasonable efforts requirement. 45 C.F.R. §§ 1356.21(b), 1357.15(e)(2). These regulations provide as much guidance to courts in assessing a State's plan as the "*factors* which a State must *consider* in adopting its rates" did in *Wilder*. 110 S. Ct. at 2522 (emphasis added). And like the Boren Amendment, the regulations here "provide[], if anything, more guidance than the provision at issue in *Wright*." *Id.* at 2522 n.17, *citing Wright*, 479 U.S. at 437 (O'Connor, J., dissenting).[15]

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[15] In view of these regulations, defendants' attempt to portray the AACWA's case plan requirements as irrelevant to this case is spurious. Brief at 31 n.18. Even if caseworkers were assigned on day 60 to prepare case plans (which, as pliantiffs alleged in their complaint, J.A. 16, 18, 24, 25, ¶¶ 44, 52, 69, 74(b), and proved at the

To escape this conclusion, defendants and the Solicitor General look at *Wilder's* "objective benchmark" only in the abstract. Defendants' Brief at 28-29; Solicitor General's Brief at 15-16. They fail to acknowledge that its formulation is only the first step in assessing hospital rembursement rates under State Medicaid plans.[16] The second step requires its application to each participating hospital—a task which, at a minimum, must account for the number of low income patients with special needs served by each hospital and for cases in which patient care has been inadequate. 42 U.S.C. § 1396a(a)(13)(A). Yet the need for a particularized application of a standard to each hospital does not render the Boren Amendment's state plan requirement subjective or unenforceable if a State sets reimbursement rates without

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hearing, Pet. App. 53a (¶ 2(b)), is often not the case), defendants' failure to assign caseworkers promptly at the outset of a case and at other times guarantees that many case plans will contain no discussion of efforts made to preserve or to reunite the family, because no efforts will have been made. Thus, defendants' failure to assign caseworkers promptly violates 45 C.F.R. §§ 1356.21(b) and 1356.21(d)(4). The District Court properly recognized the close connection between caseworker assignment and appropriate case plans as well, Pet. App. 38a, 41a, 44a, 53a, regardless of its remarks from the bench.

[16] Moreover, even at this level of abstraction, the Boren Amendment's objective standard supports enforcement of the reasonable efforts requirement. As a threshold matter, courts applyling the Boren Amendment must first determine what constitutes "reasonable" access to "adequate" health care for Medicaid-eligible individuals. 42 U.S.C. § 1396a(a)(13)(A). Only after making these non-numerical (but required) determinations can courts estimate "the costs which must be incurred by efficiently and economically operated facilities." Defendants and the Solicitor General make only passing reference to the required determinations underlying the supposedly mindless calculation of rates—and with good reason. Since courts can objectively determine, for example, what type of access to health care under a State's Medicaid plan is reasonable, they can, with equal competence, determine whether a State's efforts to keep children with their families under its AACWA state plan are reasonable.

any regard for the needs of individual hospitals. Similarly, the fact that the Secretary's regulations must be applied to particular families does not render unenforceable the State's obligation to have a plan in effect to provide reasonable efforts when it makes no efforts to keep families together. Consequently, the faulty comparison contrived by the defendants and the Solicitor General should be disregarded.

State courts have also construed the reasonable efforts mandate (or the States' own related requirements) in countless cases involving abused and neglected children.[17] Likewise, state courts have enforced an almost identical family preservation and reunification requirement in the federal Indian Child Welfare Act. 25 U.S.C. § 1912(d).[18] These cases provide extensive additional guidance to federal courts in determining whether a State has adopted and implemented a plan to make reasonable efforts.[19]

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[17] *See, e.g., In re Adam E.*, 125 N.H. 368, 480 A.2d 160 (1984) (Souter, J.); *In the Interest of Burns*, 519 A.2d 638, 647-49 (Del. 1986); *Matter of Sheila G.*, 61 N.Y.2d 368, 462 N.E.2d 1139, 474 N.Y.S.2d 421 (1984); *In re Nicole G.*, 577 A.2d 248 (R.I. 1990); *In the Interest of M.H.*, 444 N.W.2d 110, 112-13 (Iowa App. 1989); *In re Interest of Kenny F.*, 109 N.M. 472, 786 P.2d 699, 703-04 (App. 1990); *In the Interest of S.A.D.*, 382 Pa. Super. 166, 555 A.2d 123, 127-28 (1989); *In re Victoria M.*, 207 Cal. App. 3d 1317, 255 Cal. Rptr. 498, 503-05 (1989); *In the Interest of A.B.*, 444 So. 2d 981 (Fl. App. 1983); *In the Matter of Jones*, 436 N.E.2d 849, 851 (Ind. App. 1982); *In the Interest of A.M.K.*, 723 S.W.2d 50, 851 (Ind. App. 1982); *In the Interest of A.M.K.*, 723 S.W.2d 50, 52-53 (Mo. App. 1986). *But see In re Carl O.*, 10 Conn. App. 428, 523 A.2d 1339, 1343 (1987).

[18] *See, e.g., In the Interest of S.R.*, 323 N.W.2d 885, 887 (1982); *In re Smith*, 46 Wash. App. 647, 731 P.2d 1149, 1153 (Div. 1 1987).

[19] State court cases cited by defendants, Brief at 25-26, in which the court applied another standard are irrelevant to the enforceability of the reasonable efforts requirement. Others merely show that the efforts required need only be reasonable, not Herculean or interminable. *See, e.g., In re Edward C.*, 126 Cal. App. 3d 193, 206, 178 Cal. Rptr. 694, 701-02 (1st Dist. 1981).

Neither *Golden State* nor *Wilder* expressly requires an objective benchmark in order for a statutory provision to be enforceable under § 1983. *See also Dennis*, 111 S. Ct. 865. Nonetheless, to the extent one is helpful, regulations enacted by the Secretary and cases decided by state courts interpreting the Act provide guidance to courts in enforcing § 671(a)(15).

B. Congress Did Not Foreclose § 1983 as a Remedy for Systemic Violations of Children's Right to Reasonable Efforts.

Having granted children the right to reasonable efforts to remain with or to return to their families under the State's plan, Congress did not simultaneously foreclose or intend to foreclose its enforcement under § 1983. The Act contains nothing which even approximates the comprehensive remedial scheme necessary to demonstrate otherwise. *Sea Clammers*, 453 U.S. at 20-21. Accordingly, plaintiffs' right to reasonable efforts is fully enforceable under § 1983.

In addition to their improper presentation,[20] defendants' claims to the contrary are wrong. Section 672(a)(1) does not provide any role for state courts in monitoring the State's efforts to return foster children to their homes. Thus, § 672(a)(1) is completely irrelevant to the plaintiffs who are already in DCFS's custody. Likewise,

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[20] Defendants presented two questions in their petition. The first asks "[w]hether § 671(a)(15) . . . is too vague and amorphous to create an individually enforceable right under 42 U.S.C. § 1983." Pet. at i. If § 671(a)(15) is not too vague, the second question then comes into play—whether children who remain at home may enforce that requirement. Pet. at i, 19-20. Neither of these fairly includes, nor did the text of the petition address, the question of whether Congress "has foreclosed . . . enforcement of the statute in the enactment itself." *Wright*, 479 U.S. at 423. Defendants have now rephrased the questions presented, as permitted by this Court's Rule 24.1(a). They may not, however, thereby raise new issues. Accordingly, this Court should refrain from considering this question. Sup. Ct. R. 14.1(a). Nonetheless, plaintiffs briefly address defendants' argument.

state court judges have no ongoing role in ensuring that efforts are being made while the child remains at home. The AACWA requires only that they determine, at the time a State takes custody of a child, whether the State had made reasonable efforts to prevent the need for removal in that case—in other words, when it may already be too late. Finally, § 672(a)(1) does not provide any mechanism, let alone a sufficient or comprehensive one, to remedy a State's systemic failure to make reasonable efforts. Closed to class grievances, it provides no evidence of Congress' intent to preclude a § 1983 remedy. *Wright*, 479 U.S. at 427.

Other provisions of the AACWA also leave recourse to § 1983 unaffected. The Secretary's "generalized powers" to cut off funds under § 671(b) "are insufficient . . . to foreclose § 1983 remedies." *Wright*, 479 U.S. at 428. *See also Rosado v. Wyman*, 397 U.S. 397, 420 (1970). First, the AACWA does not require and HHS does not provide any formal mechanism for children to initiate enforcement proceedings against States that fail to adhere to the reasonable efforts requirement. *See Wright*, 479 U.S. at 428. Second, as the Solicitor General admits, Brief at 26 n.14, the Secretary fails to conduct *any* review of a State's efforts, relying exclusively on the narrowly circumscribed state court findings under § 672(a)(1). *See* HHS Review Guide, ACYF-IM-85-25, Att. A (Aug. 1985).[21] Finally, a cut-off of Title IV-E funding would only hurt the intended beneficiaries of the Act, leaving § 1983 as a far more appropriate remedy.

Moreover, state administrative activities required by the AACWA do not preclude enforcement of its reasonable efforts mandate through § 1983. *Patsy*, 457 U.S. 496 (1982). The provisions cited by defendants are also

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[21] The Solicitor General's citation to these provisions, Brief at 26 n.14, thoroughly undermines his earlier suggestion that the State's obligation to implement a plan to make reasonable efforts is enforced through administrative mechanisms. *Id.* at 14 n.7.

patently inadequate to remedy either systemic or individual violations of the Act. Case plans are written documents prepared by the state agency, not remedial devices. 42 U.S.C. § 675(1). They need not even be given to the child. 45 C.F.R. § 1356.21(d)(1). *See also* 89 Ill. Admin. Code § 305.5(c)(4) (requiring that case plans be given to children only when they participate in their preparation). Case reviews, provided only for children in DCFS's custody, occur only once every six months and similarly provide no remedy whatsoever for a State's violation of § 671(a)(15). 42 U.S.C. § 675(5)(B). Dispositional hearings, also provided only for children in DCFS's custody, if at all, *see Dana W. v. Suter*, No. 90 C 3479 (N.D. Ill.) (alleging systemic and continuing failure by DCFS to provide dispositional hearings); *In re Illinois Department of Children and Family Services*, HHS Appeals Board, No. 87-154, Decision No. 1037 (April 13, 1989) (finding DCFS in violation of dispositional hearing requirement), provide no more of a remedy. 42 U.S.C. § 675(5)(C).

Thus, far from the comprehensive remedial schemes reviewed by this Court in other cases, *see, e.g., Smith v. Robinson*, 468 U.S. 992 (1984),[22] the provisions of the AACWA which defendants cite provide, at most, only piecemeal and sporadic opportunities for individual plaintiffs to challenge the reasonableness of a State's efforts.

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[22] In *Smith v. Robinson*, the Court construed the Individuals with Disabilities Education Act, 84 Stat. 175, as amended, 20 U.S.C. § 1400 *et seq.* (then entitled the "Education of the Handicapped Act"). In contrast to the AACWA, the IDEA expressly authorizes a cause of action in accordance with its terms. 20 U.S.C. § 1415(e). It allows aggrieved parties to challenge a State's decision "with respect to *any* matter relating to" educational services provided. *Id.* at § 1415(b)(1)(E) (emphasis added). The statutes at issue in *Sea Clammers* provided equally wide-ranging and express authorization for private causes of action. *See, e.g.*, 453 U.S. at 7 n.11, *citing* 33 U.S.C. § 1415(g)(1) (authorizing civil action for violation of any aspect or application of the statute).

Even in combination, they provide no remedy whatsoever for systemic violations of the Act. On the contrary, they leave ample room for and are unaffected by the relief granted here through § 1983. *See Wright*, 479 U.S. at 423. Defendants fail to meet their heavy burden to show otherwise. *Robinson*, 468 U.S. at 1012.

II. PLAINTIFFS MAY ENFORCE THE AACWA'S REASONABLE EFFORTS REQUIREMENT DIRECTLY THROUGH AN IMPLIED CAUSE OF ACTION.[23]

In addition to the remedy under § 1983, the courts below correctly found that plaintiffs have an implied cause of action under the Act. In *Cort v. Ash*, 422 U.S. 66 (1975), this Court articulated the test for implying a claim directly under a statute:

> First, is the plaintiff one of the class for whose *especial* benefit the statute was enacted—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 78 (citations and internal quotations omitted, emphasis in original). The inquiry into legislative intent is the most important factor in the analysis. *Universities Research Assn., Inc. v. Coutu*, 450 U.S. 754, 771-772 (1981). In decisions since *Cort*, the Court has viewed the first and third prongs of *Cort* as indicative of that intent.

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[23] As plaintiffs argued in their brief in opposition to certiorari, defendants waived this claim by challenging only the enforceability of the AACWA under § 1983. Brief in Opposition at 16-18. Plaintiffs respond to defendants' argument here because the courts below relied on this issue in enforcing the AACWA.

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 23-24 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-576 (1979).

Applied here, these tests support the existence of an implied cause of action. In enacting the AACWA, Congress intended to create an implied cause of action, as the legislative history outlined above, *supra* at 15-17, clearly demonstrates. An express indication that an implied right of action was intended is unnecessary. As this Court stated in *Cannon v. University of Chicago*, "the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." 441 U.S. 677, 694 (1979).

Consideration of *Cort's* other factors also supports the implication of a private right of action under the Act. Congress passed the Act to protect abused and neglected children like the plaintiffs. *Supra* at 15-17. Where, as here, a statute protects a particular group rather than providing a generalized ban on proscribed conduct, this Court infers an intention to protect the rights of individuals in that group. *California v. Sierra Club*, 451 U.S. 287, 294-95 (1981). In addition, implying a private right of action is completely consistent with the underlying purpose of the Act. Litigation seeking to enforce the Act's protections would promote, not hinder the Act's purpose, especially in the absence of a comprehensive remedial scheme.

Finally, although child welfare was an area traditionally left to the States prior to the Act's passage, congressional dissatisfaction with the States' failure to keep families together was the impetus for the Act. By accepting federal funding, all 50 States have agreed to give the Federal Government an expanded role in child welfare, as well. All of these factors lead to the conclusion that the Court should imply a cause of action directly under the Act.

III. ABUSED AND NEGLECTED CHILDREN LIVING AT HOME UNDER DCFS'S SUPERVISION ARE EQUALLY ENTITLED TO ENFORCE THE ACT'S REASONABLE EFFORTS REQUIREMENT.

Under the plain language of its AACWA contract, Illinois is expressly obligated to make reasonable efforts to allow children to remain with their families. The relevant text of the Act bears repeating:

> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . provides that, in each case, reasonable efforts will be made . . . *prior to* the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home. . . .

42 U.S.C. § 671(a)(15) (emphasis added). Through this provision, Congress expressly imposed a binding obligation on participating States to make reasonable efforts to keep children out of foster care.

Defendants completely ignore this plain language. Instead, in an effort to render § 671(a)(15)(A) meaningless, they allege that Illinois does not and cannot receive any federal funding to enable the State to fulfill this obligation. Brief at 46. Defendants are wrong.

Under Title IV-E's funding formula, Illinois receives over $65 million per year to fulfill its obligations under the Act, *Overview of Entitlement Programs* 797, in contrast to the mere $1.6 million provided in *Pennhurst*, 451 U.S. at 24. DCFS spends millions of these federal dollars on programs designed to provide services to children in their own homes. Illinois State Budget, Fiscal Year 1991 (1990) at 65, 66. Thus, it is disingenuous for defendants to contend that federal funding is not provided for this purpose.[24] In fact, Congress intended for

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[24] As the Secretary has noted, participating States are also reimbursed under other provisions of the Social Security Act for services provided to abused and neglected children and their families. 45 Fed. Reg. 86826 (1980). Illinois is entitled to 50% reimbursement

Illinois to use its Title IV-E funding to fulfill the requirements of the statute, including the exercise of reasonable efforts on behalf of children at home. *See* 42 U.S.C. § 670 (authorizing funding "to carry out the provisions of" Title IV-E).[25]

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for a wide range of in-home services under Title XIX, *Overview of Entitlement Programs*, 608, 610, including case management services, to help children and their families gain access to social services, 42 U.S.C. § 1396n(g)(2), and alcohol and drug treatment programs. 42 U.S.C. § 1396d(a). It also receives over $10 million annually to provide child welfare services—including family preservation services, 42 U.S.C. § 625(a)(1)(B), (C)—under Title IV-B. *Overview of Entitlement Programs* at 795.

These programs, as companion provisions in the Social Security Act, supply part of the context in which the reasonable efforts requirement must be construed. *Pennhurst*, 451 U.S. at 18. In particular, Title IV-B, like Title IV-E, demonstrates that the AACWA's purpose is to prevent States from placing children in foster care whenever possible. *See also* 48 Fed. Reg. 23104 (1983) (describing "prevention of unnecessary separation of the child from the parents," improved care and services, and reunification and other permanency planning as the "three pillars" on which the AACWA rests).

Unfortunately, defendants' discussion of Title IV-B is less than forthright. They attempt to mislead the Court by comparing Title IV-B funding for child welfare services to the annual budget for all of DCFS. Brief at 46 n.31. Even a cursory review of the DCFS budget shows that most of its funding is allocated to provide services for which Title IV-B permits no reimbursement. *Compare, e.g.*, 42 U.S.C. § 623(c)(1)(B) (prohibiting use of Title IV-B funding for foster care and adoption assistance) *with* 1990 Illinois Legislative Service 86-1142 (West) at § 9 (appropriating $200 million for out-of-home care and adoption assistance payments).

[25] Neither the "Payments to States" described in § 674 nor the declaration of purpose in § 670 bars the States from using Title IV-E money to provide preventive services. *Cf.* 42 U.S.C. § 677(b) (barring use of funding provided for AACWA's independent living programs for other purposes); 42 U.S.C. § 623(c)(1) (barring use of certain Title IV-B funding for employment-related day care, foster care, and adoption assistance). Neither contains the express conditional language required under *Pennhurst*. 451 U.S. at 23 ("when Congress intend[s] to impose conditions on the grant of federal funds . . . , it [is] capable of doing so in clear terms").

Defendants also suggest that in order to create a binding obligation, Congress must incorporate the requirement into the funding formula. They would thereby eliminate much of Congress' authority and political responsibility under the Spending Clause. For example, under defendants' approach, States could disregard their commitments under federal-state cooperative programs if Congress chose to fund them, even fully, with fixed dollar amounts. Not surprisingly, then, defendants cite no support for this proposition. Even if their argument had merit, Congress has fulfilled the requirement they propose. First, under the current funding formula, the AACWA pays States 50% of the cost of certain expenditures they make to keep children at home under 42 U.S.C. § 674(a)(3), including referrals to services designed to prevent the need for placing them in foster care. *See In re Missouri Department of Social Services*, HHS Grant Appeals Board, No. 85-209, Decision No. 844 (March 2, 1987) at 6-11. Second, Title IV-A, which also requires States to make reasonable efforts as a condition of federal funding, 42 U.S.C. § 602(a)(20), provides 50% reimbursement to Illinois for short-term emergency services provided to help children remain with their families. 45 C.F.R. § 233.120.[26]

Defendants also ignore the Secretary's construction of the Act and his role in its enforcement. The Secretary has interpreted § 671(a)(15) as requiring the States to make efforts to preserve families before placing children

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[26] In addition, defendants' suggestion may be inconsistent with their admissions that § 671 imposes other binding obligations on them. Defendants have tacitly conceded that the Act's case plan and case review requirements are mandatory and enforceable, despite the fact that under certain circumstances, defendants would receive no reimbursement whatsoever for fulfilling them. When Title IV-B funding rises to a specified level, the formula for determining Title IV-E funding disregards entirely the amount which a State currently spends on foster care and other expenses. 42 U.S.C. § 674(b). In such event, under defendants' view of the statute, participating States would not be bound by any of Title IV-E's requirements.

in foster care. Shortly after the Act's adoption, the Secretary stated:

> The required services must be available and accessible to all children and families in need, not just the IV-E child who by definition is already in foster care. Preventive services are intended to reach the child before he or she becomes a IV-E foster child, and therefore, must be available to all children in need.

45 Fed. Reg. 86823 (1980). *See also* 45 C.F.R. § 1356.21 (d)(4) (requiring participating States to provide services prior to removal of child and to include description of such services in case plan). The legislative history discussed above, *supra* at 15-17, simply reinforces the Secretary's conclusion. *See, e.g.*, 126 Cong. Rec. 14767 (June 13, 1980) (remarks of Sen. Cranston) (participating States "will be *required* to provide [home-based] services before removing the child and turning to foster care" (emphasis added)). Moreover, as with the reasonable efforts requirement generally, *supra* at 3, the Secretary is authorized to cut off funding if Illinois fails to implement a plan to make reasonable efforts to keep children at home, providing further evidence that § 671(a)(15)(A) imposes a binding obligation on Illinois. *Cf. Pennhurst*, 451 U.S. at 23.

The States' obligation to make reasonable efforts to preserve families is the key requirement of the AACWA. About this Congress left no room for doubt. *Id.* at 18. Defendants' comparison of the AACWA to the DDA is pointless. DCFS receives and spends substantial funding under Title IV-E, Title IV-A and companion provisions of the Social Security Act to provide in-home services to families. Thus, its promise to make reasonable efforts to enable children to remain with their families is a binding one.[27]

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[27] Defendants also decry the disparate treatment by the courts below of children at home under court supervision, on the one hand, and children with no Juvenile Court involvement, on the other. Brief at 48. Defendants themselves, however, agreed to this dis-

IV. UPHOLDING THE ENFORCEABILITY OF 42 U.S.C. § 671 WILL NOT CAUSE AN "AVALANCHE" OF FEDERAL CHILD WELFARE LITIGATION OR CREATE "DIFFERENT RIGHTS IN DIFFERENT STATES" BUT WILL PRESERVE A NECESSARY REMEDY TO ENSURE COMPLIANCE WITH THE AACWA.

Unable to present any legal basis for reversal, defendants and their amici ultimately resort to apocalyptic prophecies in an attempt to dissuade this Court from enforcing Congress' clear command in § 671(a)(15). These non-legal arguments fail defendants too.

A. Allowing Plaintiffs a Remedy for Systematic Violations of the AACWA Will Not Substantially Increase Child Welfare Litigation in the Federal Courts.

As discussed above, Congress gave participating States substantial discretion in implementing the reasonble efforts requirement, and federal courts must employ a deferential standard of review in assessing whether the State has complied with the Act. *Supra* at 24. As a result, plaintiffs alleging less clear-cut violations of the Act may be hard-pressed to invoke the authority of the federal courts in AACWA-related matters. In particular, a deferential standard of review will protect the States from unwarranted judicial scrutiny in cases where they have made some efforts, perhaps even the most minimal, to permit children to remain with or be returned to their families. By contrast, defendants' conduct here could not survive even deferential court review because defend-

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tinction. R. 7 at 1. Despite defendants' denials, DCFS sets children under court supervision apart from others by initiating court proceedings on their behalf. *See, e.g.*, Pl. Ex. 2, 1/17/89 Tr. at 34. Moreover, whatever distinctions were drawn by the District Court were rational in light of Illinois law. In Illinois, children are at immediate risk of permanent removal from their homes only when the Juvenile Court assumes jurisdiction over them. *See* Ill. Rev. Stat. ch. 37, ¶ 802-9(c) (barring State from assuming full custody of a child without court approval).

ants fail to have a plan in effect to make *any* efforts to maintain and reunite plaintiffs with their families.

Likewise, defendants' prediction of an avalanche of individual federal court challenges to isolated problems in specific cases also ignores the limits of the decisions below. Brief at 38-39. Plaintiffs here alleged systemic violations of the Act's reasonable efforts requirement. The District Court entered the preliminary injunction only after receiving extensive evidence that, despite the essential role of caseworkers in preserving and reuniting families, defendants failed to assign them to countless children and their families. In affirming the preliminary injunction, the Seventh Circuit, adopting the District Court's findings of fact, also focused exclusively on DCFS's systemic deficiencies. Pet. App. 11a-12a, 19a.

Plaintiffs alleging isolated problems in individual cases, by contrast, would regularly be barred from invoking the jurisdiction of federal courts by the doctrines of collateral estoppel, res judicata, and abstention. *See, e.g., Gardner v. Parson*, 874 F.2d 131, 142 (3d Cir. 1989) (AACWA-based family preservation claim collaterally estopped by finding in Family Court proceedings).[28] Con-

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[28] Defendants and the State of Louisiana, et al., cite *Norman v. Johnson*, 739 F. Supp. 1182 (N.D. Ill. 1990), to support their claim that other cases will be unaffected by abstention or collateral estoppel. Defendants' Brief at 38 n.23; Brief of Louisiana, et al., at 13. But DCFS's inability to present those arguments successfully in *Norman* is irrelevant here. The *Norman* court rejected DCFS's collateral estoppel arguments primarily because the reasonable efforts issue had not been litigated in Juvenile Court, 739 F. Supp. at 1189, which presumably would not be true in other cases. *See* S. Rep. No. 336 at 16 (rejecting suggestion that the state courts will disregard their obligations to make reasonable efforts determinations in individual cases). Likewise, the *Norman* court rejected DCFS's abstention arguments in part because the *Norman* plaintiffs' individual Juvenile Court cases were inactive, and in part because these cases could not address the systemic questions raised in *Norman*. 739 F. Supp. at 1190. Thus, *Norman* does not invite federal courts to second-guess Juvenile Court decisions in individual cases.

gress has also expressly required participating States to provide an administrative remedy for those who complain of isolated or individual problems. 42 U.S.C. § 671(a)(12) (requiring State to provide fair hearings for "any individual whose claim for benefits . . . is denied or is not acted upon with reasonable promptness" (emphasis added)). While insufficient to preclude a § 1983 remedy here, *supra* at 37-38, such federally-required administrative remedies may preclude § 1983 enforcement in individual cases. *See Patsy*, 457 U.S. at 502 n.4. Finally, defendants' floodgates argument is thoroughly refuted by the near-total absence of litigation under the AACWA's reasonable efforts requirement to date. Since 1980, only these plaintiffs and two of the named plaintiffs in *Norman* have obtained injunctive relief under § 671(a)(15). And of the cases defendants cite as evidence of the coming deluge, Pet. at 9, none involve mere individual challenges to caseworker decisions.

In short, there will be no avalanche, and no floodgates will open. The federal government generally, and the federal courts in particular, will retain only the limited role contemplated for them by Congress and accepted by Illinois. As Judge Cummings stated:

> The district court's injunctive relief does not . . . interfere with the ability of caseworkers to exercise their own professional judgment on the job. The court is not creating federally enforceable rights to beds, monetary assistance, or housing. The injunction merely fulfills the minimal requirement of the [AACWA] that reasonable efforts are made towards the goals of reducing unnecessary foster care placements and family disruption, and it does so through a method designed to maximize DCFS decision-making.

Pet. App. 16a-17a.

B. Federal Court Enforcement of the Reasonable Efforts Requirement Will Not Create "Different Rights in Different States" Or Undermine the Purposes of the AACWA.

Federal courts are obligated to tailor remedies to fit the particular circumstances of individual litigants. *See* Dobbs, *Handbook on the Law of Remedies* 54-55 (1973). Viewed in that light, the approach employed by the District Court and approved by the Court of Appeals was far from novel. The District Court first held that plaintiffs had an enforceable right to a state plan providing reasonable efforts in each of their cases—the same right that abused and neglected children have in other participating States. Pet. App. 11a. After finding that defendants had violated that right, the Court then simply crafted a remedy which was consistent with defendants' definition of the role of the caseworker in the DCFS system. *See, e.g.*, Pet. App. 55a, J.A. 48 at ¶ 37.

Defendants and their amici, however, criticize the decisions below as "creating different rights in different states." Defendants' Brief at 36; Louisiana Brief at 7-10. In addition to confusing right with remedy, *see* Dobbs, *supra*, at 3, this argument ignores the responsibility of federal courts to shape remedies to fit the parties before them. Federal statutes do not require blindly uniform remedial measures for them to be enforceable.

Defendants and other State amici also criticize the Court of Appeals' decision with the outlandish assertion that the decision will *discourage* the creation of new child welfare programs. Defendants' Brief at 39-40; Louisiana Brief at 10. This criticism reflects a fundamental misunderstanding of the proceedings below. The uncontroverted evidence showed that caseworkers are absolutely indispensable for Illinois to fulfill its obligation to children and their families under § 671(a)(15). Thus, unless a State itself concedes that a particular service is indispensable and then systematically fails to provide it, that

State will remain free, consistent with the Act's purpose, to expand and experiment with new child welfare services without fear of liability.

C. Denying the Enforceability of the Act Would Completely Eviscerate Its Family Preservation and Family Reunification Requirements and Leave Children Like the Plaintiffs with No Protection Against Unnecessary or Protracted Placement in Foster Care.

In *DeShaney v. Winnebago County Department of Social Services*, 109 S. Ct. 998 (1989), this Court confirmed that the scope of a State's affirmative duties to its citizens are set not by the Constitution, but by Congress and State legislatures. As the Court stated, "[t]he Framers were content to leave the extent of [affirmative] governmental obligation . . . to the democratic political processes." *Id.* at 1003. In this instance, Congress has established the scope of States' obligations through the AACWA. A product of the democratic political process, the AACWA requires participating States to provide certain aid to its citizens—namely, through their plans to make reasonable efforts to keep families together. Illinois has voluntarily accepted this obligation through its AACWA contract with the federal government. Therefore, this Court should enforce the statute as Congress intended.

Plaintiffs recognize that on occasion, federal courts have been reluctant to assume jurisdiction of cases involving private disputes *within* families. *See, e.g., Thompson v. Thompson*, 484 U.S. 174 (1988). Nevertheless, this Court has regularly protected families against unwarranted intervention by the State. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *see also Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (describing family as the paradigm of those relationships protected against unwarranted State intervention). The duty of courts is all the more clear when, as

here, Congress has provided children a statutory safeguard against unwarranted intrusions into family integrity by participating States.

This Court has also long recognized that it must, when the need arises, enforce social welfare legislation, even when the undertaking may be "highly complicated." As the Court in *Rosado* stated:

> It is . . . peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use.

397 U.S. at 422-23. Abused and neglected children deserve at least as much protection from this Court as plaintiffs in other social welfare cases. These children have no access to the legislative process, nor any adequate alternative remedies. They depend on this Court to enforce the unambiguous language of Congress, which requires Illinois to make reasonable efforts to maintain or reunite them with their families.

CONCLUSION

For all of the foregoing reasons, plaintiffs respectfully request that the Court affirm the decision of the United States Court of Appeals for the Seventh Circuit.

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No. 90-1488

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ARGUMENT

I.

IT IS CLEAR UNDER THIS COURT'S PRECEDENT THAT THE "REASONABLE EFFORTS" CLAUSE OF THE AAA DOES NOT CREATE A FEDERAL RIGHT UNDER SECTION 1983

A. Plaintiffs Compound The Error Of The Court Below By Failing Even To Acknowledge, Let Alone Apply, The Controlling *Pennhurst* Standard

Any analysis in this case under 42 U.S.C. § 1983 ("Section 1983") must begin with the fact that the federal Adoption Assistance and Child Welfare Act of 1980 (the "AAA") is a federal-state cooperative funding statute, enacted pursuant to Congress' power under the Spending Clause of the Constitution. In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1

(1981), this Court made clear that because such a statute is "in the nature of a contract," the very legitimacy of Congress' ability to create individual federal rights there "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " *Id.* at 17. *Pennhurst* and its progeny require that when asked to infer the existence of a federal right in the AAA, courts must conduct a "crucial inquiry" as to "whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." *Id.* at 25; *see Wilder v. Virginia Hosp. Ass'n,* 110 S. Ct. 2510 (1990); *Wright v. Roanoke Redevelopment & Housing Auth.,* 479 U.S. 418 (1987).

The fundamental flaw throughout the arguments set forth by plaintiffs and their *amici* is their failure to recognize this basic premise for congressional action. Indeed, like the court of appeals below, plaintiffs devote but a single paragraph to a discussion of *Pennhurst,* suggesting that *Pennhurst* is inapplicable because the statute at issue there, unlike the AAA, was "hortatory, not mandatory." (Resp. Br. 19 (quoting *Pennhurst,* 451 U.S. at 24); *see also* App. 11a).[1] Yet this Court has squarely established that the clear statement required by *Pennhurst* consists of *two* components: a statutory provision creating individual federal rights must be both mandatory and specific. *See, e.g., Wilder,* 110 S. Ct. at 2517; Pet. Br. 16-17.

Thus, in *Wilder,* this Court's analysis did not stop when the Court determined that the Boren Amendment was mandatory in requiring a state plan providing for the payment to medical facilities of "reasonable and adequate" Medicaid rates. Rather, the Court analyzed the context, statutory structure, legislative history, and regulatory framework before concluding that Congress

[1]Briefs will be cited as follows: Brief for Petitioners ("Pet. Br."); Brief for the United States as *Amicus Curiae* ("US Br."); Brief of the States of Louisiana, *et al.* as *Amicus Curiae* ("States' Br."); Brief of Respondents ("Resp. Br."); Brief of the National Council of Juvenile and Family Court Judges as *Amicus Curiae* ("NCJJ Br."); Brief of the American Bar Association as *Amicus Curiae* ("ABA Br."); Brief for American Association for Protecting Children, *et al.,* as *Amici Curiae* ("AAPC Br."); Brief of the Illinois State Bar Association, *et al.,* as *Amici Curiae* ("ISBA Br."); and Brief *Amicus Curiae* of the National Association of Counsel for Children, *et al.* ("NACC Br.").

also had sufficiently provided an "objective benchmark" to define a federal right to "reasonable and adequate" rates.[2] *Wilder,* 110 S. Ct. at 2522-23; *see* Pet. Br. 18-19.

Despite the plain directive of *Wilder,* plaintiffs assert that no "objective benchmark" is required. (Resp. Br. 36). Instead, plaintiffs contend that mere use of the word "reasonable" in a statute is sufficient to create a federal right. (Resp. Br. 28-30). There is simply no basis under *Pennhurst* or its progeny for such an assertion. To the contrary, this Court undertook a searching analysis of the "entire context" of the Boren Amendment in *Wilder* to determine whether the statute created a right to "reasonable and adequate" reimbursement rates. Likewise, in *Wright,* 479 U.S. 418, this Court examined in detail the statutory structure, legislative history, and regulatory scheme of the Brooke Amendment to determine the existence of a right to a "reasonable" rent allowance.[3]

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[2]Despite plaintiffs' lengthy exposition in their brief, the question as to whether Section 671(a)(15) is mandatory (or was intended to benefit abused and neglected children) is not at issue in this case. (Resp. Br. 15-22). Defendants maintain that Section 671(a)(15) sets forth a mandatory obligation which may be enforced in individual cases by the state courts (*see* 42 U.S.C. § 672(a)(1)) and administratively by the Secretary of Health and Human Services (*see* 42 U.S.C. § 671(b)). (Pet. Br. 17; US Br. 24-26). Plaintiffs are incorrect in their rhetorical argument that Illinois is seeking to "accept federal funding while disregarding the Act's mandate." (Resp. Br. 12). Defendants here seek only to avoid an intrusion by the federal courts into the delicate and highly individualized area of child abuse and neglect, an area Congress expressly chose to leave to state child welfare agencies, state courts, and the Secretary. (*See* US Br. 12).

[3]Mere string citations of other statutes using the word "reasonable," without regard to their relevance to the "reasonable efforts" clause at issue here, are no substitute for the required inquiry as to Congress' actions specifically in enacting Section 671(a)(15). (NACC Br. 13 n.8). Likewise, none of the cases interpreting such "reasonableness" provisions cited by plaintiffs and their *amici* involves an inquiry even remotely analogous to the examination of congressional intent dictated by *Wilder* and *Wright.* For example, the two most recent cases cited by plaintiffs, *International Organization of Masters, Mates, & Pilots v. Brown,* 111 S. Ct. 880 (1991), and *United States v. R. Enterprises, Inc.,* 111 S. Ct. 722 (1991), both involve application of enforceable "reason-

(Footnote continued)

Plaintiffs' novel assertion that this Court's analysis must include the specific underlying facts of this case also is contrary to the limits imposed by federalism on the creation of federal rights. The *Pennhurst* requirement that federal rights be clear at the time States accept federal funds, 451 U.S. at 17, 23-25, refutes any notion that Spending Clause statutes are to be "judged on an as-applied basis." (Resp. Br. 24-25 (quoting *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988))).[4]

(Footnote 3 continued from previous page)
ableness" requirements, not whether Congress intended those requirements to be enforceable in the first place.

Plaintiffs' reliance on *Youngberg v. Romeo*, 457 U.S. 307 (1982), is similarly misplaced. (Resp. Br. 30; *see also* NACC Br. 26-27). In *Youngberg*, this Court held that the Constitution requires "minimally adequate training . . . as may be reasonable in light of [involuntarily committed persons'] liberty interests." 457 U.S. at 322. *Youngberg* then specifically defines "unreasonable" conduct as being "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 323. The AAA contains no comparable standard or definition by which the "reasonableness" of a State's efforts under Section 671(a)(15) may be measured.

[4]The cases plaintiffs cite in no way support their argument. The defendants in *Maynard*, 486 U.S. 356, and *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963), asserted that it violated due process to apply vaguely worded statutes that failed to provide the defendants proper notice that their conduct was illegal. Such a due process claim must be tested under the facts of each specific case. *See Maynard*, 486 U.S. at 361. Here, by contrast, the question is whether Congress expressed a clear intention that Section 671(a)(15) be individually enforceable in federal court, a question that must be analyzed independent of the facts of any subsequent individual case. Where there is no "clear statement" of congressional intent, there is no federal right on any facts.

Plaintiffs' argument that there must be a federal right because the facts of this case allegedly reveal a clear violation of the "reasonable efforts" clause is similarly flawed. Plaintiffs cite to *Wilder* for the proposition that while there may be a range of "reasonable efforts," the facts of this case represent efforts that a federal court may clearly find outside that range. (Resp. Br. 24 (citing *Wilder*, 110 S. Ct. at 2523)). In *Wilder*, the Boren Amendment set forth a series of factors that clearly defined the parameters of the "range of reasonable rates" and provided standards against which "unreasonable" rates were to be measured. No such guidance is provided here. (*See* App. 25a (Manion, J., dissenting)).

Finally, plaintiffs' *amici* provide a compelling argument for reversal of the decision below. Despite plaintiffs' repeated invocation of congressional intent (*see, e.g.*, Resp. Br. 15, 32, 33, 40), both the ABA and the National Council of Juvenile and Family Court Judges admit that they unsuccessfully *asked* Congress in 1988 and 1989 to change the AAA to authorize a private right of action. (NCJJ Br. 18; ABA Br. 2). Plaintiffs now ask this Court to do what Congress has refused to do: create a federally enforceable individual entitlement to "reasonable efforts" to keep or return a child home in each case. Under *Pennhurst,* this Court cannot impose new federal rights on the States where Congress has declined to do so, and this Court should reject plaintiffs' claim.

B. Plaintiffs Misread The Entire Context Of The AAA, Which Demonstrates That Section 671(a)(15) Does Not Create A Federal Right

By disregarding the principles of *Pennhurst,* the examination by plaintiffs and their *amici* of the context, language, legislative history, and regulatory scheme of the AAA misses the mark. Instead of finding the clear congressional statement required by *Pennhurst,* plaintiffs' analysis distorts even the plain language of the statute itself in an effort to locate a right to "systemic" efforts to preserve or reunify families. Plaintiffs' labors are fruitless, as there is no clear statement creating such a right.

This distortion echoes throughout plaintiffs' argument, as they repeatedly assert that a federal right to "reasonable efforts" exists because "a court need only determine that caseworkers are not being assigned in order to find a violation of the Act—an 'inquiry well within the competence of the judiciary.' " (Resp. Br. 27; *see id.* at i, 11). The question before this Court, however, is not whether the AAA creates a federal right to caseworkers.[5] The

[5]Indeed, plaintiffs argue that Congress "noted in particular that caseworker assignment problems were a key impediment to family reunification." (Resp. Br. 16). Yet the AAA itself makes no mention of caseworkers. If, as plaintiffs assert, Congress was aware of caseworker problems and declined to specify any obligations by the States in that regard, this Court should not now do so.

question is whether Congress has provided the States a clear statement defining an enforceable right in each case to "reasonable efforts" to keep or return an abused or neglected child home.

1. There Is No Evidence That Congress Chose To Create A Federal Right To "Reasonable Efforts" To The Exclusion Of Other Existing Child Welfare Standards

Without citing any authority, plaintiffs assert that in the AAA, Congress considered the difference of opinion that existed in the child welfare field and "authoritatively resolved the issue" by creating a federal right to "reasonable efforts." (Resp. Br. 19; *see also* NACC Br. 24). They maintain that defendants' explanation as to the existing tension between a "reasonable efforts" standard favoring parental interests and a standard based on the child's best interests is "irrelevant" and "obscure[s]" this Court's analysis. (*Id.*).

However, as explained in *Wilder,* 110 S. Ct. at 2518, the Court must consider the entire context of a federal funding statute to determine whether Congress intended to create new enforceable rights. When Congress acts in an area of traditional state concern and federal intervention may disrupt long-settled institutional arrangements and substantive law, this Court properly declines to view the statute in isolation.

This case underscores the crucial importance of this broad inquiry. As discussed in Petitioners' Brief at 23-24, the AAA was enacted in the context of evolving views of child welfare, which included growing dissatisfaction with the then exclusive standard by which children were removed from their homes based on their "best interests." Because such a standard ignored parental interests, critics suggested use of a standard focusing on whether "reasonable means" were available to protect the child at home. *See, e.g.,* Mnookin, *Foster Care—In Whose Best Interest?,* 43 Harv. Educ. Rev. 599, 613-27 (1973).

This led to adoption of the "reasonable efforts" clause in Section 671(a)(15), *see* 125 Cong. Rec. 22681 (1979) (remarks of Sen. Cranston), and the requirement in Section 672(a)(1) that state courts consider *both* "reasonable efforts" *and* the "welfare of [the]

child" in making individualized determinations as to whether a child should be removed from home.[6] *See* 42 U.S.C. § 672(a)(1); Pet. Br. 24-26. Thus, contrary to plaintiffs' assertion, Congress clearly did not intend in Section 671(a)(15) to establish a federal right to "reasonable efforts" to the exclusion of all other considerations.[7] While Congress expressed a preference for "reasonable efforts" to preserve or reunify families, it expressly left to the state judiciaries the delicate task of weighing the "reasonable efforts" and "best interests" standards in light of the circumstances "in each case."[8]

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[6]Notably, the version of the AAA originally passed by the House of Representatives in 1979 did not contain the state court provision of Section 672(a)(1), although it included a "reasonable efforts" provision. However, in finally enacting the AAA, Congress explicitly chose to add in Section 672 the consideration by state courts of both "reasonable efforts" and the "welfare of [the] child." S. Rep. No. 336, 96th Cong., 2d Sess. ("S. Rep.") 1, 15, *reprinted in* 1980 U.S. Code Cong. & Admin. News ("USCCAN") 1448, 1464.

[7]The ISBA *amici* misread defendants' argument on this point. (ISBA Br. 16-17). Defendants do not dispute the importance of providing family preservation and reunification services as part of the overall range of programs to be included in a foster care system. However, there continue to be differing views as to the manner in which these "reasonable efforts" are to be balanced against other interests of the child. *See, e.g.*, Garrison, *Child Welfare Decision Making: In Search of the Least Drastic Alternative,* 75 Georgetown L.J. 1745, 1802 (1987). Clearly, there is still no consensus that the standard of "reasonable efforts" to family preservation or reunification should *predominate* over all other considerations, including the best interests of the child. *See, e.g., In re Ashley K.,* 212 Ill. App. 3d 849, 871, 879, 571 N.E.2d 905, 918, 923 (1991) (despite recognizing the AAA's family reunification aim, the court holds that "a child's best interest is and must remain inviolate and impregnable from all other factors, including the interests of the biological parents.").

[8]Plaintiffs question why Section 671(a)(15) is so "vague and amorphous as to be beyond the competence" of the federal courts to enforce when defendants acknowledge that the AAA provides in Section 672(a)(1) for state courts to make such determinations. (Resp. Br. 30-31; *see also* NACC Br. 10). Obviously, Section 672(a)(1), unlike Section 671(a)(15), makes clear that the consideration of "reasonable efforts" must be balanced with a determination that continuation at home "would be contrary to the welfare of [the] child." 42 U.S.C. § 672(a)(1). Moreover, Section 672(a)(1) explicitly requires the case-by-case determination implicit in the requirement that "reasonable efforts" be made

(Footnote continued)

2. Plaintiffs Disregard The Plain Language Of The Statute

Plaintiffs and *amici* repeatedly insist that the only right created by Section 671(a)(15) is a right to a "system" of "reasonable efforts." (Resp. Br. 46; NACC Br. 25-26; NCJJ Br. 15; ABA Br. 24; ISBA Br. 19; *see also* NACC Br. 26 (suggesting existence of a right to a "structure")). However, neither plaintiffs nor their *amici* explain how a statute providing that "reasonable efforts" be made "*in each case*" creates a right solely to a *system* of such efforts. It is not sufficient simply to argue that because this case involved systemic allegations that all "reasonable efforts" cases will be similarly limited. (Resp. Br. 46).

In order to avoid the plain language of Section 671(a)(15), plaintiffs and their *amici* distort the terms of the Act by attempting to merge the "reasonable efforts" clause of Section 671(a)(15) —the only provision of the AAA at issue here—with a wholly separate section requiring that the state plan under Section 671 be "in effect in all political subdivisions of the State." 42 U.S.C. § 671(a)(3); *see* Resp. Br. i, 1, 2, 14; ISBA Br. 5, 19, 20, 27, 28; NACC Br. 2, 5. Plaintiffs never mentioned Section 671(a)(3) in their Complaint (J.A. 5), their brief in the district court (R. 60), their brief in the Seventh Circuit (Brief of Plaintiffs-Appellees), or their response to the Petition. They cannot raise it for the first

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"in each case." In the absence of an individual assessment of the risk of harm to an abused or neglected child, the term "reasonable efforts" to keep or return the child home has no substance.

Plaintiffs also make the puzzling suggestion that state juvenile courts lack any expertise in child welfare. (Resp. Br. 31; *see also* NACC Br. 19). Their argument likely comes as a surprise to their *amici,* the National Council of Juvenile and Family Court Judges, whose entire brief in this Court is based on the premise that specialized state courts have expertise in child welfare decision making. (*See* NCJJ Br. 16 ("individual child welfare determinations are uniquely appropriate for state, not federal, determination")). Moreover, plaintiffs mislead the Court when they suggest that "in Illinois, ... all trial courts are courts of general jurisdiction, and only one county has judges who hear only abuse and neglect cases." (Resp. Br. 31 (citations omitted)). In fact, state law expressly contemplates specialized juvenile courts hearing abuse, neglect, and dependency cases. *See* Juvenile Court Act §§ 801-1 *et seq.*, Ill. Rev. Stat. ch. 37, ¶¶ 801-1 *et seq.*

time in this Court. *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 38-39 (1989).[9]

Plaintiffs cannot avoid the fact that Section 671(a)(15) by its very terms sets forth an inherently subjective case-by-case standard, not an "objective benchmark" as required under *Wilder.* Defendants do not maintain that the requisite "objective benchmark" must be a "mindless" numeric calculation. (Resp. Br. 34 n.16). Rather, *Wilder* and *Wright* hold that Congress must provide some standards against which the "reasonableness" of the State's efforts may be judged. Thus, this Court found that the multiple factors set forth in the Boren Amendment, including whether rates were sufficient to provide Medicaid recipients with "reasonable access" to adequate inpatient services,[10] provide the context and standards by which courts could consistently assess the reasonableness of reimbursement rates. *Wilder,* 110 S. Ct. at 2522-23; Pet. Br. 28-29.[11] No such factors, context, or standards exist anywhere in Section 671(a)(15).

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[9]Regardless, Section 671(a)(3) adds nothing to the analysis of the "reasonable efforts" clause. Section 671(a)(3), like Section 671(a)(15), is one of seventeen distinct requirements for the state plan. *See* § 671(a). It creates no overarching requirement. On its face, Section 671(a)(3) merely requires geographic uniformity in the state plan. *See Boddie v. Wyman,* 434 F.2d 1207, 1210 (2d Cir. 1970) (identical language in Titles IV-A and XVI aimed at elimination of "arbitrary differences in welfare payments between areas in the same state"), *aff'd,* 402 U.S. 991 (1971).

[10]Plaintiffs argue that if federal courts can determine what constitutes "reasonable access" to hospital services, they can determine whether a State's efforts to keep or return children home are "reasonable." (Resp. Br. 34 n.16). However, the federal right at issue in *Wilder* was the right to "reasonable and adequate" reimbursement, *not* "reasonable access" to hospital services. Federal courts interpreting the Boren Amendment will not be asked to define "reasonable access"; they will use that factor to assist in determining whether Medicaid rates have been set so low that, among other things, Medicaid recipients are unable to obtain inpatient services. This inquiry provides a standard against which to measure the "reasonableness" of rates. (*See* Pet. Br. 28 n.15).

[11]These statutory factors provide the benchmark by which all individualized determinations as to hospital rates may be adjudged reasonable. (*See* Resp. Br. 34-35). There are no factors under Section 671(a)(15) by which the efforts to keep or return a child home "in each case" similarly may be consistently measured as "reasonable." In one

(Footnote continued)

If a federal right to such a case-by-case determination is held to exist, it is inevitable that this new right will result in federal case-by-case reviews, leading to an untenable intrusion by the federal courts into the individual decisions of state juvenile courts and child welfare specialists.[12] For example, in *Norman v. Johnson*, 739 F. Supp. 1182 (N.D. Ill. 1990), Section 671(a)(15) provided the vehicle for three parents of children in DCFS custody to obtain federal court review and individualized orders in their respective cases. The report of the magistrate judge is illustrative of the examinations federal courts will be called upon to make if Section 671(a)(15) is held to create an enforceable right. In a series of detailed findings, the magistrate judge reviewed the reasons why the plaintiffs' children were removed from home (*e.g., id.* at 1196), the specifics of the case plans developed for the plaintiffs (*e.g., id.* at 1196-97), the services recommended and provided for the plaintiffs (*id.*), and the professional opinions of the plaintiffs' caseworkers (*e.g., id.* at 1198-99). In the case of plaintiff Gina Johnson, the dispute centered on resolution by the federal court of a difference of professional opinion between the plaintiff's DCFS caseworker and private agency caseworker. *Id.* at 1198.[13]

(Footnote 11 continued from previous page)
case, the determining factor may be the severity of harm to the child, while in another it may be the willingness of the parents to participate in treatment, while in yet another it may be the special medical or psychiatric needs of the child; and in each of these cases, it may or may not be reasonable to balance these factors against the relative cost to the State of providing services to the child at home or in foster care. Unlike the Boren Amendment, the AAA provides no guidance as to how any of these determinations are to be made.

[12]Plaintiffs characterize the prediction of an avalanche of individual federal claims as "apocalyptic" and "non-legal." (Resp. Br. 45; *see also* NACC Br. 23). In fact, however, the consequences that will follow from creation of a new federal right under Section 671(a)(15) are plainly relevant to whether Congress intended to create such a right and whether individual enforcement is consistent with the statutory scheme.

[13]The ISBA *amici*, which include the class members in *Norman*, suggest that *Norman* was a class action involving only systemic actions by DCFS. (ISBA Br. 12-13). In fact, defendants contested class certification as inappropriate in that case, and no decision on class certification had been reached at the time the individual injunctions were issued. *See*
(Footnote continued)

Plaintiffs and their *amici* provide no answer as to how claims under Section 671(a)(15) would be limited to avoid a proliferation of such individual cases throughout the federal courts, or any indication that Congress intended to permit such federal court review.[14] Their assertions that individual claims would regularly be barred from federal court by the doctrines of collateral estoppel, res judicata, and abstention (Resp. Br. 46) are also refuted by *Norman*, where defendants' arguments on each of these points were rejected. *See Norman*, 739 F. Supp. at 1189-90. As the *Norman* court found, "[w]hile the state court may have the power to order the type of individual relief presently requested, there is no active proceeding in which such relief is being sought." *Id.* If a federal right to "reasonable efforts" is established by this Court, nothing will prevent future plaintiffs from avoiding state juvenile courts and bringing their claims first to federal court.[15] The inevitable result will be a federalization of all child welfare decision making relevant to the efforts made to preserve or re- families.

(Footnote 13 continued from previous page)
Norman, 739 F. Supp. at 1184 n.1. The ISBA *amici*'s discussion also overlooks the decision to deny injunctive relief to plaintiff Gina Johnson, a decision necessarily predicated on an examination of individual, non-systemic actions by DCFS. *Id.* at 1196-99. Furthermore, although the district court found that the plaintiffs had suffered from alleged systemic deficiencies, the court also cited state court precedent where "individual parents were permitted to claim violations of the AAA without proving systemic deficiencies." *Id.* at 1188 n.13.

[14]In addition to *Norman*-type injunctive actions, a ruling that Section 671(a)(15) creates a federal right likely could bring a flood of individual damages actions. *See, e.g., Del A. v. Edwards*, 855 F.2d 1148 (5th Cir. 1988) (upholding damage claims under the AAA and affirming denial of summary judgment against state defendants on qualified immunity grounds), *app. dismissed*, 867 F.2d 842 (1989); *L.J. v. Massinga*, 838 F.2d 118 (4th Cir. 1988) (same), *cert. denied*, 488 U.S. 1018 (1989).

[15]Plaintiffs contend that the courts may require future plaintiffs to exhaust state administrative remedies before bringing federal litigation. (Resp. Br. 47). However, no court has suggested that the AAA's state court hearing requirement must be exhausted prior to federal litigation, and a similar argument was rejected by this Court in *Patsy v. Board of Regents*, 457 U.S. 496 (1982).

3. The AAA's Legislative History Does Not Demonstrate That Congress Intended To Create A Federal Right To "Reasonable Efforts"

None of the arguments plaintiffs marshal substantiates plaintiffs' contention that "[t]he history of the Act demonstrates that Congress intended § 671(a)(15) to be judicially enforceable." (Resp. Br. 32). Initially, plaintiffs argue that because Congress enacted the AAA after this Court's decision in *Miller v. Youakim*, 440 U.S. 125 (1979), Congress "incorporated the enforceability of State plan requirements . . . into the state plan requirements in Title IV-E." (Resp. Br. 32). *Miller*, however, interpreted a precisely defined requirement of Title IV-A, and says nothing about whether vague statutory provisions in Title IV-A or any other title may create enforceable rights.[16]

Plaintiffs also contend that there must be an individual enforceable right under Section 1983 because "Congress made the reasonable efforts requirement the touchstone of the Act." (Resp. Br. 12). The legislative history, however, shows that Congress' primary purpose in enacting the AAA was to restructure the federal funding mechanism for foster care. As plaintiffs and *amici* point out (Resp. Br. 15; AAPC Br. 15), the previous Title IV-A foster care program gave States a fiscal incentive to place and keep children in foster care by providing unlimited federal matching funds for foster placement with no such assistance for placement prevention options. *See, e.g.*, S. Rep. at 10, 15, *reprinted in* 1980 USCCAN at 1459, 1465.

The AAA replaced the foster care funding mechanism of Title IV-A with a combination of unlimited adoption assistance and a capped foster care funding program. "The committee believes

[16]If plaintiffs' argument were correct, this Court in *Wilder* would not have conducted a searching inquiry into the substance of the Boren Amendment, which also is a "State plan requirement" under the Social Security Act. Moreover, this Court in *Miller* applied a *Pennhurst*-style "clear statement" test: "Had Congress intended to exclude related foster parents from the definition of 'foster family home,' it presumably would have done so explicitly, just as it restricted the definition of 'child care institution.' " *Miller*, 440 U.S. at 137. To the extent *Miller* guided Congress in drafting the AAA, this Court reminded Congress to define terms and state its intentions clearly and unambiguously.

that the combination of an open-ended adoption assistance program and a closed-end foster care program represents an important restructuring of Federal incentives toward permanent placement of children." S. Rep. at 16, 1980 USCCAN at 1466. That restructuring of federal fiscal incentives, and not the various procedural requirements of Section 671, was the key reform of the AAA. *See* 125 Cong. Rec. 29503-04 (1979) (remarks of Sen. Moynihan, one of the statute's sponsors); *see also Vermont Dep't of Social and Rehabilitation Servs. v. United States Dep't of Health and Human Servs.*, 798 F.2d 57, 59 (2d Cir. 1986) (the AAA creates only "fiscal incentives to encourage a more active and systematic monitoring of children in the foster care system"), *cert. denied*, 479 U.S. 1064 (1987). As this Court noted in *Pennhurst*, 451 U.S. at 18: "Surely Congress would not have established such elaborate funding incentives had it simply intended to impose absolute obligations on the States."

Plaintiffs also cite isolated statements by Senator Cranston, referring to the role of courts in evaluating whether preventive services should be provided prior to the removal of a child, as somehow evidencing congressional intent to create a private right of action under Section 1983. (Resp. Br. 32-33). These statements make no reference to enforcement of the AAA by individuals in federal court, and instead serve merely to underscore the role of state courts in weighing "reasonable efforts" and the "welfare of [the] child" as set forth in Section 672(a)(1). As Senator Cranston later points out, the AAA "leav[es] to the discretion of the States the precise mechanisms" for implementing the statute's provisions. 125 Cong. Rec. 22685 (1979).[17] Congress nowhere expressed an intent to have federal courts intrude on state decision making in an area this Court has always found to be uniquely within the province of the States. *See, e.g., Thompson v. Thomp-*

[17]Plaintiffs attempt to analogize this "substantial discretion" under the AAA to that afforded the States by the Boren Amendment in *Wilder*. (Resp. Br. 24). Plaintiffs overlook a crucial distinction in the legislative history of each statute. Although the Boren Amendment gave States a certain amount of flexibility, Congress explicitly stated in the legislative history its intent to continue the prior practice of federal court enforcement by medical facilities. *See Wilder*, 110 S. Ct. at 2521-22.

son, 484 U.S. 174, 186 (1988); *Moore v. Sims*, 442 U.S. 415 (1979).[18]

In the absence of any "objective benchmark" provided by Congress, plaintiffs seek to impose on the States a benchmark created out of cases and advocacy materials generated *after* the statute's enactment. Plaintiffs contend that state court cases decided after 1980 give sufficient guidance as to the definition of the "reasonable efforts" clause. (Resp. Br. 35). Once again plaintiffs ignore *Pennhurst*, which requires that a State be able to ascertain the contours of the bargain it enters at the time it accepts federal funds. *Pennhurst*, 451 U.S. at 17, 23-25. Even if the state cases provided any sort of uniform framework defining "reasonable efforts," which they do not (Pet. Br. 25-26), *post hoc* rulings cannot define the contract between Congress and the States.

For the same reason, the "standards" promoted by various advocacy groups defining "reasonable efforts" cannot be used to impose federal rights on the States. (*See* AAPC Br. 22-24). Congress did not adopt (or even refer to) those standards, most of which were issued long after the AAA was enacted in 1980. (*Id.*). *See* Child Welfare League of America, *Standards for Service to Children and Families in Their Own Home* (1984) x-xi (noting that pre-1980 preliminary standards "could not reconcile the then-current differences in purpose, philosophy, social work theory and practice"; revised standards were not issued until 1984). The States could not possibly have accepted an obligation to meet those standards in 1980. Outside advocacy groups cannot create new federal rights by fiat. *Cf. Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 130 n.* (1987) ("attempt at the creation of legislative history through the *post hoc* statements of interested onlookers is entitled to no weight").[19]

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[18]Contrary to plaintiffs' contention (Resp. Br. 49), this deference by the federal courts extends to matters involving state intervention in cases of child abuse and neglect. *See, e.g., Moore*, 442 U.S. at 435; *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 304 (7th Cir. 1987), *aff'd*, 489 U.S. 189 (1989).

[19]Without a clear definition by Congress of what constitutes "reasonable efforts," the court of appeals used Illinois' own actions as the stan-

(Footnote continued)

4. Federal Regulations Do Not Provide The Objective Benchmark Missing From Section 671(a)(15)

Plaintiffs erroneously assert that the regulations implementing the AAA set forth the necessary benchmark. (Resp. Br. 33-35). Yet the regulation at issue here provides no guidance at all: it merely lists a host of services the States *may* provide. 45 C.F.R. § 1357.15(e)(2).[20]

In fact, as described in the Brief for the United States, the Secretary considered and rejected a detailed mandatory regulation of the type referred to in *Wilder* and *Wright.* (US Br. 20-22). After careful consideration, the Secretary determined that it would be "an inappropriate and unnecessary intrusion to dictate a specific set of services" under Section 671(a)(15). 48 Fed. Reg. 23,104, 23,107 (1983) (adopting final rule implementing Section 671(a)(15)). Instead, the Secretary viewed it as "essential" to permit the States to have "flexibility and responsibility for these services decisions." *Id.*

Plaintiffs do not challenge this decision by the Secretary as arbitrary or unreasonable. Thus, the Secretary's determination to leave to the States the ability to develop resource priorities and

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dard by which "reasonableness" was to be measured. Again, this construct ignores the basic contract premise set forth in *Pennhurst,* and will lead to federal rights and standards that will vary among each of the 50 States. (Pet. Br. 33-35).

Moreover, the very innovation in child welfare services intended by the AAA likely will be discouraged if the opinion below is affirmed, as States move to limit their liability by reducing the scope of their "reasonable efforts" activities. (Pet. Br. 39-40). Plaintiffs assert that this argument "confus[es] right with remedy." (Resp. Br. 48). They are mistaken. The district court and court of appeals in this case looked to Illinois' own voluntary actions to determine what efforts were "reasonable." (App. 11a-12a). Thus, the right, and not merely the remedy, was based on the State's own voluntary efforts.

[20]Plaintiffs gloss over the distinction between the *mandatory* factors to be considered under the regulatory schemes in *Wilder,* 110 S. Ct. at 2522, and *Wright,* 479 U.S. at 432, and the non-binding nature of Section 1357.15(e)(2). (Resp. Br. 33). The distinction is crucial. The laundry list of services in Section 1357.15(e)(2) in no way channels the discretion of state decision makers.

individual service choices in the context of limited funds, *see id.* at 23,106-07, is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See also Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991) ("Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches.").

C. The AAA Provides A Comprehensive Remedial Scheme To Review "Reasonable Efforts" In Individual Cases

Notwithstanding the AAA's comprehensive judicial and administrative enforcement mechanisms (*see* Pet. Br. 40-42),[21] plaintiffs assert that Congress could not have intended to foreclose private remedies for "systemic violations" through Section 1983. (Resp. Br. 36-39). Plaintiffs' argument, however, erroneously assumes that Section 671(a)(15) creates a "systemic" right. (*Id.* at 37).

Plaintiffs acknowledge that the AAA provides for an explicit state court determination of "reasonable efforts" at the time the State takes custody of a child. 42 U.S.C. § 672(a)(1). (Resp. Br. 30). Nonetheless, they argue that this protection cannot evince a congressional intent to preclude Section 1983 actions because state courts are not required to make the determination at other points during a child's case. (*Cf.* ABA Br. 6-16 (arguing that Section 671(a)(15) ensures that state agencies develop adequate information for the state court in individual cases)). In so doing,

[21]Plaintiffs once again contend that defendants have waived this and other arguments by not adequately raising them in the Petition. (Resp. Br. 36 n.20). Although the questions in the Petition were narrowly tailored to the facts of this case, the question whether plaintiffs may enforce Section 671(a)(15) through Section 1983 clearly encompasses the issue of the statute's comprehensive enforcement scheme. (*See* Resp. Br. 13 (acknowledging that enforceable rights and remedial scheme are both prongs of Section 1983 analysis; *quoting Wilder,* 110 S. Ct. at 2517)). This issue was fully briefed and decided below. (App. 13a-14a). (*See also* Pet. Br. 42 n.28 (addressing plaintiffs' argument that defendants waived implied right of action argument even though that argument was explicitly preserved in the body of the Petition)).

plaintiffs disregard the statute's other protections, including detailed case plans (§§ 671(a)(16), 675(1)),[22] judicial or administrative review of each child's case every six months (§§ 671(a)(16), 675(5)(B)),[23] and judicial dispositional hearings within eighteen months of a child's placement (§§ 675(5)(C)).[24]

Plaintiffs next contend that state administrative activities cannot preclude private enforcement through Section 1983.[25] (Resp. Br. 37 (citing *Patsy,* 457 U.S. 496)).[26] The AAA, however, contains both judicial and administrative protections, such as those this Court has found to preclude actions under Section 1983. *See Smith v. Robinson,* 468 U.S. 992, 1004 (1984) (holding that the

[22]Section 675(1)(B) requires that the case plan "assur[e] that . . . services are provided to the parents, child, and foster parents in order to . . . facilitate return of the child to his own home or the permanent placement of the child." In conjunction with the case review system defined in Section 675(5)(B), the case plan ensures timely judicial or administrative review of the efforts made to reunify children with their families "in each case."

[23]Plaintiffs contend that the case review provides "no remedy whatsoever for a State's violation of § 671(a)(15)." (Resp. Br. 38). However, the case review requirement is properly viewed in light of Congress' intent to delegate to the States primary responsibility for implementation of Section 671(a)(15) in individual cases. *See also* 42 U.S.C. § 672(a)(1). The six-month case review requirement ensures that every child in State custody has a regular opportunity to raise issues concerning the State's permanency planning for that child.

[24]Plaintiffs complain that state juvenile courts in Illinois have failed to undertake timely dispositional hearings. (Resp. Br. 38). An allegation that a State subsequently has not complied fully with a statute's *procedural* requirement, even if true, cannot compel the conclusion that Congress therefore intended to permit enforcement of the statute's substantive provisions through Section 1983.

[25]Plaintiffs *amici* also complain that the Secretary does not adequately enforce Section 671(a)(15). (*See* ISBA Br. 26; ABA Br. 23-24). As noted by the United States, however, the Secretary has determined that deference to the States is consistent with congressional intent in enacting the AAA. (US Br. 20-22). That decision should be respected by this Court under *Chevron,* 467 U.S. 837.

[26]This Court held in *Patsy* that exhaustion of State administrative remedies was not a prerequisite to a Section 1983 action. That question differs from whether Congress intended that federally mandated administrative and judicial remedies preclude Section 1983 enforcement altogether.

"carefully tailored *administrative and judicial* mechanism" set out in the Education of the Handicapped Act (the "EHA"), 20 U.S.C. §§ 1400 *et seq.*, precluded resort to Section 1983 (emphasis added)).[27]

II.

PLAINTIFFS CANNOT PROVE CONGRESSIONAL INTENT TO AUTHORIZE A PRIVATE RIGHT OF ACTION

Plaintiffs' contention that Congress authorized an implied private right of action to enforce Section 671(a)(15) merits little further comment. (*See* Pet. Br. 42-45). Plaintiffs admit that the crucial inquiry is whether Congress intended to create such a right. (Resp. Br. 39). Plaintiffs cite no evidence of that intent in the statute or its legislative history. They clearly have not met their heavy burden.

Nor do the remaining *Cort v. Ash* factors favor an implied private right of action. Contrary to plaintiffs' assertion (Resp. Br. 40), creating a private right of action is inconsistent with the statutory structure, purposes, and the tradition of State primacy in the area of child welfare. Both the AAA and its legislative history evince a congressional intent to "leav[e] to the discretion of the States the precise mechanisms" for enforcing the statute's protections. 125 Cong. Rec. 22685 (1979) (remarks of Sen. Cranston).

III.

CONGRESS COULD NOT HAVE INTENDED TO CREATE A FEDERAL RIGHT TO SERVICES FOR CHILDREN NOT IN FOSTER CARE WHEN FUNDS WERE NOT PROVIDED UNDER TITLE IV-E FOR THOSE SERVICES

In an effort to extend the purported entitlement to "reasonable efforts" to children not in foster care, plaintiffs completely distort

[27] *Smith* is closely analogous to this case. As with the AAA, the EHA's procedures included regular administrative reviews of individualized education plans for each handicapped child, 20 U.S.C. § 1414(a)(5), and judicial review. *Smith*, 468 U.S. at 1011. In such circumstances, the Court "f[ound] it difficult to believe" that Congress intended a Section 1983 remedy. *Id.*

the funding mechanism contained in Title IV-E. (Resp. Br. 41-44). Plaintiffs argue that, although Illinois receives Title IV-E reimbursement only for services to children in a "foster family home" or "child care institution," 42 U.S.C. § 672,[28] the State is free to spend the federal dollars any way it wants. (Resp. Br. 41-42). Plaintiffs miss the point. If Illinois spends a dollar on services to a child at home, the State cannot possibly be reimbursed for that dollar under Title IV-E.[29]

Defendants do not suggest "that in order to create a binding obligation, Congress must incorporate the requirement into the funding formula." (Resp. Br. at 43). The issue here is not whether Congress created a "binding requirement," but instead whether Congress created a federal right enforceable through Section 1983. Defendants' argument does not call into question Congress' power to act under the spending power. Where Congress provides no federal monies to the State under a Spending Clause statute, however, this Court should not infer a congressional intent to create sweeping new federal entitlements for every child in the State.

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[28]Plaintiffs point to the fact that the States receive partial reimbursement for costs of administering the state plan. (Resp. Br. at 43 (citing 42 U.S.C. § 674(a)(3)). This reimbursement relates solely to administration of the entire state plan and not to the provision of substantive family preservation or reunification services. *See* § 674(a)(3).

[29]Seeking to buttress their claim under Title IV-E, plaintiffs point out that the States receive federal monies under other statutes for services to children at home. (Resp. Br. 41 n.24 (citing Titles XIX, IV-B), 43 (citing Title IV-A)). Plaintiffs did not raise Titles IV-A and XIX below and specifically disavowed reliance upon Title IV-B (R. 60 at 20 n.8). They have waived this argument. *Granfinanciera*, 492 U.S. at 38-39.

Even if plaintiffs could raise these points, funding under one federal program cannot possibly form part of the "contract" between the federal government and the States under a separate program. *See Pennhurst*, 451 U.S. at 14, 24 (finding no federal right based on limited funding provided under Section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act, even though additional funds were provided under other sections of the Act). Also, as defendants' comparison of Title IV-B funding *nationwide* to a single State's child welfare budget (Pet. Br. 46 n.31) shows, Title IV-B's minimal contribution is hardly sufficient to evince a congressional intent to create federal rights. *Pennhurst*, 451 U.S. at 24.

CONCLUSION

WHEREFORE, for the foregoing reasons and those in the Brief for Petitioners, petitioners Sue Suter and Gary T. Morgan respectfully ask that this Court reverse the decision of the United States Court of Appeals for the Seventh Circuit and remand for dismissal of the case.

Dated: Chicago, Illinois
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No. 90-1488

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

SUE SUTER, ET AL., PETITIONERS

v.

ARTIST M., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The United States will address the following question:

The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500, provides that States wishing to receive federal financial assistance for foster care payments must have a plan approved by the Secretary of Health and Human Services that provides that "in each case, reasonable efforts will be made" to prevent the need for placing a child in foster care, and, if placement is made, to return the child to his home. 42 U.S.C. 671(a)(15). The question presented is whether the requirement that a state plan provide that "in each case, reasonable efforts will be made" by the State creates a federal right that is enforceable in a private action under 42 U.S.C. 1983.

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STATEMENT OF INTEREST

The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500, establishes a cooperative federal-state program (the Title IV-E program) to provide federal financial assistance to the States for foster care and adoption services.[1] In order to be eligible for payments under the program, States must have a plan, approved by the Secretary of Health and Human Services (HHS), that provides, among other things, that "in each case," the State will make "reasonable efforts" to prevent the need for foster care placement, and to reunify children with their families. 42 U.S.C. 671(a)(15).

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[1] The provisions at issue in this case are codified in Title IV-E of the Social Security Act, 42 U.S.C. 670-679a. Companion provisions codified in Title IV-B of the Social Security Act, 42 U.S.C. 620-628, provide federal assistance for the improvement of child welfare programs.

In this case, the court of appeals held that a class of children may sue a state agency under 42 U.S.C. 1983, claiming that the State is failing to make "reasonable efforts" to keep children in, or return them to, their homes as contemplated by Section 671(a)(15). The United States has a significant financial and administrative interest in the resolution of this issue. By law, the Secretary must reimburse participating States for "foster care maintenance payments" at a rate of between 50% and 83% of the State's costs, as well as covering 75% of training and 50% of administrative expenses in the State's implementation of its Title IV-E plan. 42 U.S.C. 674(a) (1988 & Supp. I 1990). In fiscal year 1990 alone, federal payments for such services totaled nearly $1.5 billion, of which approximately $65.8 million was paid to the State of Illinois.[2]

The United States also has a regulatory interest in this case. The Secretary is required not only to approve a State's Title IV-E plan, but also to discontinue or reduce federal funds if the State's plan no longer complies with the Act or if the State has failed substantially to comply with its plan. 42 U.S.C. 671(b). Moreover, in issuing regulations to implement Title IV-E, the Secretary has specifically rejected the idea that national standards should be imposed on the States through the "reasonable efforts" requirement. Instead, the Secretary has determined that the States should have substantial flexibility in delivering preplacement and family reunification services, and that the proper bodies to provide oversight are the state courts—which are required by 42 U.S.C. 672(a)(1) to determine, in the context of individual foster-care placement proceedings, whether the State has made reasonable efforts to avoid the need for such placement. If

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[2] Staff of House Comm. on Ways and Means, 102d Cong., 1st Sess., *Overview of Entitlement Programs: 1991 Green Book* 797-798 (Comm. Print 1991). All 50 States and the District of Columbia participate in the Title IV-E program. *Ibid.*

the court of appeals' holding is upheld, federal courts will be empowered to review substantial aspects of the operations of state child welfare agencies and to determine what States must do to comply with the "reasonable efforts" requirement. Such Section 1983 actions will not only circumvent the Secretary's enforcement role and the particularized determinations by state courts, but will also thwart the intention of the law to leave substantial discretion to the States on how to keep troubled families together.

STATEMENT

1. The Adoption Assistance and Child Welfare Act of 1980 (Adoption Act or Act), Pub. L. No. 96-272, 94 Stat. 500, was enacted to provide the States with financial incentives "to lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes." S. Rep. No. 336, 96th Cong., 1st Sess. 1 (1979). The Act establishes a cooperative federal-state program (the Title IV-E program) that provides federal financial assistance to the States for foster care and adoption services for children who otherwise meet the requirements for assistance under the Aid to Families with Dependent Children (AFDC) program. See 42 U.S.C. 672(a); S. Rep. No. 336, *supra*, at 12. Under the Act, the federal government reimburses the States for the costs of foster care placement when the Act's requirements are satisfied. 42 U.S.C. 672, 674, 675(4)(A).

To participate in the program, States must have a plan, approved by the Secretary of Health and Human Services (HHS), that meets 17 listed requirements. 42 U.S.C. 671(a)(1)-(17). Among other things, the plan must provide that "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return

to his home." 42 U.S.C. 671(a)(15). The plan must also provide for the development of a "case plan" for each child that documents, among other things, the child's circumstances, the foster care arrangements, and the services to be provided to facilitate family reunification or permanent placement, and a "case review system" establishing procedures for assuring that children are afforded a case plan and periodic review to evaluate and resolve the child's status. 42 U.S.C. 671(a)(16), 675(1) and (5).

The Act does not define the phrase "reasonable efforts." Nor do the Secretary's regulations spell out specific requirements with respect to "reasonable efforts." The regulations provide only that, in implementing the foster care provisions of a state plan, a State's "case plans" prepared for each child should "include a description of the services offered and the services provided to prevent removal of the child from the home and to reunify the family." 45 C.F.R. 1356.21(b), (d)(4). The regulations also include examples of such services, without mandating that a State provide any particular service. 45 C.F.R. 1356.21(a), 1357.15(e)(2) (listing services including "twenty-four hour emergency caretaker, and homemaker services; day care; crisis counseling; individual and family counseling; emergency shelters").

Under the Act, the efforts of a State to prevent the need for foster care placement are evaluated by state courts in individual cases. The Act provides that, unless a child has been removed from the home with the voluntary agreement of the child's parent or guardian, a participating State may make reimbursable "foster care maintenance payments" only if there has been "a judicial determination to the effect that continuation" of the child in the home "would be contrary to the welfare of such child and * * * that reasonable efforts of the type described in section 671(a)(15) * * * have been made." 42 U.S.C. 672(a)(1). For children in foster care, family-reunification efforts are evaluated in periodic reviews of

their status conducted at least once every six months by an administrative body or a court, and in a dispositional hearing that must take place within 18 months. 42 U.S.C. 675(1) and (5).

The Act does not provide for any private causes of action. Instead, it directs the Secretary to discontinue or reduce a State's funding upon a determination that an approved plan no longer complies with Section 671(a), or that "in the administration of the plan there is a substantial failure to comply" with the plan's provisions. Payments under Title IV-E shall resume when the Secretary is satisfied that the State is in compliance. 42 U.S.C. 671(b).

2. Respondents are wards of the Juvenile Division of the Circuit Court of Cook County, Illinois. In December 1988, respondents filed a class action against petitioners alleging violations of the Adoption Act by the Department of Children and Family Services (DCFS), an agency of the State of Illinois. Pet. App. 1a-2a. Although respondents' complaint relied on several statutory provisions and the Due Process Clause, the only claim at issue here is the assertion that DCFS violated 42 U.S.C. 671(a)(15) by failing to make "reasonable efforts" to avoid the removal of children from the home and to reunify children with their families where removal had occurred. Pet. App. 3a, 42a n.8. Respondents alleged that DCFS violated the rights of class members in two ways: first, by not making prompt assignments of caseworkers to children who are living at home under protective orders or who are in the custody or under the supervision of DCFS, and, second, by not promptly reassigning cases when the initial caseworker leaves the case. *Id.* at 2a; J.A. 12-14, 25. Respondents urged that the failure to provide for prompt and continuous assignments of caseworkers led to unnecessary neglect and family disintegration. Pet. App. 3a. The violation allegedly gave rise to an implied right of action under the Act and to a claim under 42 U.S.C. 1983. Pet. App. 4a.

The district court certified a class,[3] denied petitioners' motion to dismiss, Pet. App. 32a-50a, and entered a preliminary injunction directing DCFS to assign a caseworker "capable of providing child welfare services" within three days of a case's first hearing in juvenile court, and to reassign a caseworker within three days after the initial caseworker leaves the case. *Id.* at 4a, 51a-56a. In framing its decree, the court relied on statements by DCFS that assigning caseworkers within three days of an initial juvenile court hearing "would not be overly burdensome." *Id.* at 54a; J.A. 48.[4]

2. On petitioners' appeal, the court of appeals remanded for additional findings regarding the nature of the delays in caseworker assignments and the extent to which DCFS had progressed in implementing voluntary reforms. Pet. App. 5a; J.A. 49-52. After the district court made the required findings, J.A. 28-48, the court of appeals affirmed the preliminary injunction, concluding that respondents had a cause of action to enforce the Act's "reasonable efforts" provision under Section 1983. Pet. App. 9a-18a, 20a.

In finding that the "reasonable efforts" provision creates an "enforceable right" within the meaning of Section 1983, the court noted that the Act was intended to benefit needy children requiring child welfare services, and that it imposed a binding obligation on States elec-

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[3] The class consisted of all children who are or will be (a) subjects of juvenile court petitions, (b) in DCFS's custody, or in a home under DCFS supervision by order of the juvenile court, and (c) without a caseworker for a significant period of time. Pet. App. 32a. The court also certified a subclass consisting of "children who are or will be the subjects of * * * petitions filed in Juvenile Court who are or will be placed in DCFS' custody and who are or will be without a DCFS caseworker for a significant period of time." *Ibid.*

[4] The court had initially deferred ruling in light of DCFS's institution of voluntary reforms to remedy delays in caseworker assignments. Pet. App. 33a-34a, 52a. The court ultimately found, however, that those reforms had not been adequately implemented. J.A. 42-44, 48.

ting to receive federal funds. Pet. App. 10a. Relying on *Wilder* v. *Virginia Hospital Ass'n*, 110 S. Ct. 2510 (1990), the court also held that the "reasonable efforts" provision was "sufficiently explicit that the pertinent clauses are judicially enforceable." Pet. App. 11a. Although acknowleging that the State has "substantial discretion" in choosing what services to offer in making "reasonable efforts," the court stated that "[t]he judiciary is nevertheless capable of determining whether the state is exerting 'reasonable efforts' to provide those services." *Id.* at 12a. Considering the injunction in this case, the court found that the requirement of assigning caseworkers within three days "fits the estimate given by the DCFS itself of how quickly it would assign caseworkers under its promised reforms"; therefore, the district court had not unduly "inject[ed] itself into the operations of the DCFS." [5] *Id.* at 13a.

Judge Manion dissented. Although acknowledging that the "horror stories recited by the district court produce an almost irresistible desire for judicial intervention," he concluded that "the 'reasonable efforts clause' * * * is too ambiguous and indefinite to form a basis for a recognizable right and an enforceable obligation under the [Act] or § 1983." Pet. App. 20a-21a. Under the majority's decision, the dissent argued, the federal court is moved "from its proper role as impartial arbiter of cases and

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[5] The court also failed to discern a congressional intent to foreclose resort to Section 1983 because it found no "comprehensive remedial scheme" embodied in the Act. Pet App. 13a-14a. As to whether the Act supports an implied right of action to enforce the "reasonable efforts" provision, the court engaged in little independent analysis. It noted that the issue "closely resembles the analysis courts use to determine whether a Section 1983 cause of action exists," and distinguished the two issues only by noting that in the implied right context, the burden falls on the plaintiff to show the existence of a right to sue. Pet. App. 15a. The court then found an implied right to exist, pointing out that petitioners had disputed that claim "for the same reasons that the right is supposedly unenforceable under Section 1983." *Ibid.*

controversies under the law to that of a crisis administrator of child welfare." *Id.* at 29a-30a.

SUMMARY OF ARGUMENT

A. To state a claim under Section 1983 for the violation of a federal statute, the plaintiff must invoke an enforceable federal right. To satisfy that requirement, the provision alleged to be violated must define an interest that is " 'sufficiently specific and definite' to be within 'the competence of the judiciary to enforce.' " *Golden State Transit Corp.* v. *City of Los Angeles*, 110 S. Ct. 444, 449 (1989), quoting *Wright* v. *Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 431-432 (1987). If the interest asserted is "too vague and amorphous" for judicial application, it cannot be enforced under Section 1983. *Wilder* v. *Virginia Hospital Ass'n*, 110 S. Ct. 2510, 2517 (1990).

B. The provision of the Adoption Act on which respondents rely is too vague and amorphous to qualify as an enforceable right under Section 1983. Section 671 (a) (15) requires a state plan to provide that, "in each case, reasonable efforts will be made" to prevent the need for foster case, and to allow the child to return to the family. 42 U.S.C. 671 (a) (15). Although this provision was enacted to benefit children like respondents, and is enforceable by the Secretary's power to cut off federal funds, it is far too general to guide a federal court in reviewing the adequacy of a State's actions. The statutory language directs attention to "reasonable efforts" with respect to individual children, rather than mandating specific, across-the-board procedures. The statute does not lend itself to enforcement through federal court decrees.

The court of appeals, however, approved just such a decree, in reliance on this Court's decision in *Wilder*. That reliance was misplaced. Unlike the requirement considered in *Wilder*, Section 671 (a) (15) provides no

"objective benchmark" to use in measuring the "reasonableness" of the State's efforts, nor do the implementing regulations make the requirement more precise. The delivery of child welfare services is qualitatively different from the issue of "reasonable and adequate" rates considered in *Wilder*; the federal courts have no institutional competence in how to keep families together.

C. The "reasonable efforts" provision in the Act was intentionally left vague and open-ended. Congress recognized that it was establishing a new and ambitious goal for the States in Section 671(a)(15), refrained from imposing overly specific means for carrying it out, and intended the requirement to be applied with deference to the States' need for discretion in this complex field. Likewise, the Secretary drafted regulations with attention to the States' need for flexibility. After exploring the possibility of requiring specific services, the Secretary opted to leave the States freedom to tailor their "efforts" to the needs of individual children.

D. The use of Section 1983 in this child welfare case implicates two factors that heighten the need for close attention to the "vague and amorphous" inquiry. First, domestic relations issues have traditionally been the sole province of the States and their courts. Federal courts therefore have virtually no experience in the matters they would confront in Section 1983 litigation over "reasonable efforts." Second, the Act places particular reliance, not only on the expertise of the Secretary, but also on state-court determinations that state agencies have provided "reasonable efforts." 42 U.S.C. 672(a)(1). Against that background, it is hard to believe that Congress intended the federal courts to give content to the "reasonable efforts" requirement under Section 1983, with the necessary effect of circumventing both the Secretary's interpretation of the Act and the individual determinations of state courts, and requiring that federal courts make basic policy choices that are by their nature not entrusted to the Article III branch.

ARGUMENT

The Adoption Act's Requirement That A State Make "Reasonable Efforts" To Avoid The Dissolution Of Families Is Not An Enforceable Right Under 42 U.S.C. 1983

A. A Federal Requirement That Fails To Provide Sufficiently Specific and Definite Standards For The Courts Is Not Enforceable In A Section 1983 Action

Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. 1983. Although statutory violations are cognizable under Section 1983, *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), not every statutory violation gives rise to a Section 1983 action. The plaintiff must assert the violation of a "federal right," *Golden State Transit Corp.* v. *City of Los Angeles*, 110 S. Ct. 444, 448 (1989), and Congress must not have foreclosed the enforcement of that right under Section 1983. *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (finding Section 1983 action foreclosed by a comprehensive scheme of remedies).

In order to find an "enforceable right," a court must conclude, first, that the provision in question was "intend[ed] to benefit the putative plaintiff." *Wilder* v. *Virginia Hospital Ass'n*, 110 S. Ct. 2510, 2517 (1990). Second, even if an intent to benefit the plaintiff is shown, a Section 1983 action will not lie where the provision at issue, rather than creating an obligation that binds the governmental unit, "does no more than express a congressional preference." *Golden State Transit Corp.*, 110 S. Ct. at 448, quoting *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 19 (1981). Third, "[i]n all cases, the availability of the § 1983 remedy turns on whether the statute, by its terms or as interpreted, creates obligations 'sufficiently specific and definite' to be within 'the competence of the judiciary to enforce.'" *Golden State Transit Corp.*, 110 S. Ct. at 449, quoting

Wright v. *Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 431-432 (1987). Where "[t]he interest the plaintiff asserts is 'too vague and amorphous'" for the courts to administer, *Wilder*, 110 S. Ct. at 2517, quoting *Wright*, 479 U.S. at 432, a "right" within the meaning of Section 1983 will not be recognized.

In *Wright*, this Court found that tenants living in public housing authority projects had the right under the Brooke Amendment to the Housing Act of 1937, Pub. L. 91-152, § 213, 83 Stat. 389, and its implementing regulations, to enforce certain rent ceilings with respect to utility charges. In finding that the tenants were not relying on a right that was "too vague and amorphous" for judicial enforcement, the Court was guided by the fact that the applicable administrative regulations "specifically set out guidelines that the [regulated entities] were to follow in establishing utility allowances." 479 U.S. at 431-432. The Court thus concluded that the rent provisions were "sufficiently specific and definite to qualify as enforceable rights * * * under § 1983" and were not "beyond the competence of the judiciary to enforce." *Id.* at 432.

Similarly, in *Wilder*, the Court concluded that the Boren Amendment, 42 U.S.C. 1396(a)(13)(A), created enforceable rights in a Section 1983 action. The Amendment required States participating in the Medicaid Program to devise rates to reimburse health care providers "which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities * * *." The Court rejected the claim that this standard was too vague and amorphous to be within the competence of the judiciary to enforce. In doing so, the Court noted that the statute and regulation set out factors that a State must consider in setting its rates. 110 S. Ct. at 2522. The Court also emphasized that the statute provides an "objective benchmark" in requiring rates that will compensate "efficiently and eco-

nomically operated facilities" operating in compliance with applicable legal standards, while providing " 'reasonable access' to eligible participants." *Id.* at 2522-2523. The Court added that even though judicial review would entail "some knowledge of the hospital industry," that inquiry was "well within the competence of the judiciary." *Id.* at 2523.

The requirement of specific and definite standards, applicable in all statutory Section 1983 cases, is particularly important where a funding statute for social welfare programs is concerned. Under Section 1983, federal courts review the actions of state officials, may enjoin conduct, and may require the payment of damages. Unless a federal program sets clear enough standards to be applied by the federal courts, there is a serious risk that those courts will infringe on state functions in areas that were intentionally left to state discretion, subject only to federal administrative oversight.[6]

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[6] In *Wilder*, we argued that the interest of providers in having a State make "assurances" to the Secretary under a funding program does not rise to the level of an enforceable right under Section 1983. See *Wilder*, 110 S. Ct. at 2519 n.11. The Court, however, rejected that submission because it concluded that the Boren Amendment's requirement that a State must "find" that its rates comply with the statutory requirements constitutes a "separate obligation[]" that independently warranted the implication of an enforceable right. *Ibid.* It therefore remains an "open question whether an individual's interest in having a State provide * * * 'assurances' [to the Secretary] is a 'right secured' by the laws of the United States within the meaning of § 1983." *Pennhurst*, 451 U.S. at 28. It is equally questionable whether an individual's interest in having a State conform to its "plan approved by the Secretary" (42 U.S.C. 671(a)) is a "right" secured by the laws of the United States for purposes of Section 1983. Such voluntary, intergovernmental arrangements do not expressly confer rights on individuals to particular services. At most, the individual's interest would appear to be that a State that receives federal funds have a plan that is consistent with the Act. Cf. *Wilder*, 110 S. Ct. at 2527 (Rehnquist, C.J., dissenting).

B. The Requirement That A State Make "In Each Case, Reasonable Efforts" To Avoid The Need For Foster Care Or To Reunify The Family Is Too Vague And Amorphous To Qualify As An Enforceable Right Under Section 1983

Section 671(a)(15) requires a state plan to provide that, "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home." 42 U.S.C. 671(a)(15). That requirement, unlike the financial requirements considered in *Wright* and *Wilder*, is aimed at a profound social problem of great complexity and diversity: the predicament of children who may need to be, or have been, removed from their homes and placed in the foster care system. Although Section 671(a)(15) requires, as a condition of receiving federal funds, that participating States make "reasonable efforts" to avoid the breakup of families, and to seek to reunite them, that stipulation is too "vague and amorphous" to be enforced by federal courts in Section 1983 actions.

Section 671(a)(15) does satisfy two elements of the test for identifying an enforceable right. *Wilder*, 110 S. Ct. at 2517; *Golden State Transit Corp.*, 110 S. Ct. at 448; see also *Dennis* v. *Higgins*, 111 S. Ct. 865, 871 (1991). The "reasonable efforts" requirement of Section 671(a)(15) is plainly intended to benefit children such as the plaintiffs in this case. Moreover, the statute makes compliance with that requirement an express condition of a State's receiving funding under the Act; the requirement is mandatory, not precatory. Cf. *Pennhurst*, 451 U.S. at 18-27. The statute mandates that "[i]n order for a State to be eligible for payments under this part, it *shall* have a plan approved by the Secretary which * * * provides that, in each case, reasonable efforts will be made" to achieve the stated goals. 42 U.S.C. 671(a)(15) (emphasis added). The statute also authorizes the Secretary

to refuse or reduce funding to any State that fails to comply with Section 671(a)'s provisions. 42 U.S.C. 671 (b). The plain language of the statute therefore makes clear that the "reasonable efforts" requirement is binding on States that accept funding under the Act.[7] *Wilder*, 110 S. Ct. at 2519.

Nevertheless, as this Court has recognized, mandatory and administratively enforceable requirements are not enforceable under Section 1983 where they are "too vague and amorphous" to be within the competence of the judiciary. *Wilder*, 110 S. Ct. at 2517. The "reasonable efforts" requirement of the Adoption Act is such a vague and amorphous requirement. The language of Section 671(a)(15) gives little indication that Congress intended to create a judicially enforceable right to attack practices in a State's provision of child welfare services, particularly systemwide practices, as respondents have sought to do in this case. The provision contemplates individualized reasonable efforts "in each case"; it does not suggest (and appears inconsistent with) the notion that any particular range of services is *per se* required. Indeed, the phrase "reasonable efforts" itself connotes the idea that a wide variety of steps are likely to be sufficient in seeking to

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[7] The dissent in the court of appeals was of the view that Section 671(a)(15)'s "reasonable efforts" requirement is so vague that States accepting funding under the Adoption Act cannot understand what obligations the Section creates, and, therefore, the Section "cannot create binding obligations and rights." Pet. App. 27a. We disagree. While the "reasonable efforts" requirement is too vague to create a *judicially enforceable right* in favor of the plaintiffs, the statute makes clear that a State that accepts funding has an *administratively enforceable obligation* to make the reasonable efforts described by the Section. Nor is the requirement that a State make "reasonable efforts" on behalf of children who are not yet in foster care merely precatory on the theory that the federal government does not pay for such services. The State's provision of preplacement services is integral to the Act's goal of avoiding unnecessary foster care placements where children can be kept at home. It also serves to reduce State payments for foster care, which the federal government must reimburse.

attain the Act's overall goals of trying to prevent placement and reunify families, and that none are mandated across the board.[8]

The circumstances that led the Court to conclude that the requirements at issue in *Wright* and *Wilder* were susceptible of judicial enforcement are wholly lacking here. First, neither the statute nor the regulations set forth any factors that a State must consider in determining what efforts are reasonable to keep children in their homes. The regulations provide only a list of preplacement preventive and reunification services that a State *may* provide in implementing requirements imposed under 42 U.S.C. 627(a)(2)(C) and (b)(3)—requirements that address, on a program-wide level, concerns similar to those reflected in the case-specific "reasonable efforts" requirement of Section 671(a)(15). See 45 C.F.R. 1356.21(b), 1357.15(e)(2). The list does not define what a State must consider in its provision of particular reasonable efforts; it is in the nature of a suggestion of possible services. The regulation, therefore, does not give specific, judicially enforceable content to the vague provisions of Section 671(a)(15).

Second, the "reasonable efforts" requirement is not tied to any "objective benchmark" as was true in *Wilder*, 110 S. Ct. at 2523. The requirement at issue in *Wilder* lent itself to judicial enforcement because a court is fully

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[8] The court of appeals mandated such universal services by upholding the injunction that caseworkers be assigned within three days *in all cases*. That order intruded on the State's discretion to tailor services to individual families' needs. See Pet. App. 16a n.11 (State argued that injunction "deprived [DCFS] of the 'flexibility' to make assignments at different rates of speed depending on the gravity of the case or the expertise required"). The court believed that its intrusion was justified by the fact that the State itself had given the three-day "estimate * * * of how quickly it would assign caseworkers under its promised reforms." Pet. App. 13a. But the State's "estimate," made as a matter of internal policy, is not enforceable under *federal* law, and certainly cannot be construed as a mandatory requirement "in each case."

capable of taking evidence concerning the costs faced by an "efficiently and economically operated facility" providing care in accordance with applicable federal and state laws, and then determining whether state-selected rates are "reasonable and adequate" to cover such costs. No such objective benchmark can be found to assist federal courts in actions raising the question of what preplacement preventive and reunification services will constitute "reasonable efforts" to keep children in or return them to their homes. Reasonable with respect to what? What other States are doing? What state funds are available? The answer in *Wilder* was spelled out in the statute: reasonable with respect to what costs an efficiently and economically operated facility would incur. Here, the determination is not a matter of calculating costs. The determination of what assistance to provide is intrinsically tied to the facts of an individual case, and to concepts of appropriate services. The statutory standard is reasonable efforts "in each case." 42 U.S. 671(a)(15). In some cases, reasonable efforts to prevent the removal of the child from the home might even mean no efforts, when it is clear that the health or safety of the child dictates swift removal. A federal court would lack any objective scale by which to quantify and measure the reasonableness of the State's efforts to preserve and reunify families.

The "reasonable efforts" requirement is qualitatively different from the reasonableness requirements at issue in *Wright* and *Wilder*. In both of those cases, state officials were bound by federal law to come up with a *number*—a reasonable utility allowance in *Wright*, and a reasonable reimbursement rate in *Wilder*. Although States had discretion in determining the precise method they would use to calculate the number, there was no question about the general nature of their task. By contrast, the requirement of making "reasonable efforts" to preserve families is wholly open-ended. A vast range of different types of actions might be reasonable. Different

cases call for different types of efforts, and a single case might be reasonably handled in many different ways. There is no "right answer"; determining what is "reasonable" in this area involves policy judgments of the sort the federal courts are not empowered to make. See pp. 22-27, *infra*.

Allowing private enforcement of the "reasonable efforts" requirement in Section 1983 actions—particularly in class actions such as the present one—therefore creates a distinct danger of undermining, rather than promoting, the Act's objectives. The statutory standard and the regulations implementing it are deliberately vague, so as to leave state administrators with flexibility. By their nature, however, federal court injunctions cabin discretion. Indeed, the framing of such injunctions to enforce vague statutory requirements may put federal courts in the role of managing state agencies and formulating policy. To allow enforcement of the "reasonable efforts" requirement under Section 1983 would thus deprive state administrators of the flexibility needed to keep families together.

C. The Legislative And Regulatory Background Of The "Reasonable Efforts" Requirement Is Not Consistent With Federal Court Enforcement Under Section 1983

1. The legislative history of the Adoption Act demonstrates that Congress did not intend to mandate a floor level of "reasonable efforts" susceptible to judicial enforcement in Section 1983 actions. Congress understood that the Act required major changes in child welfare services, and it intended to leave the States discretion in how to implement those changes.

The Act grew out of intensive consideration of the proper role of the federal government in the delivery of child welfare services. Prior to the Act, federal funds were not specifically provided for services designed to keep children at home, instead of being placed in the foster care system. But studies showed that children were often removed from their homes without such efforts hav-

ing been made, and "many children remained in foster care for long periods of time, a phenomenon known as 'foster care drift.'" D. Ratterman, *Reasonable Efforts: A Manual For Judges* 2 (1987); see also 45 Fed. Reg. 86,818 (1980) (comments accompanying proposed rulemaking under the Act); *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 833-836 (1977).

To address that problem, the Adoption Act comprehensively revised federal funding programs supporting state child welfare services. Testimony before Congress indicated that "new requirements in the law" would be necessary "to assure that State programs include a variety of services to prevent the need for foster care, as well as to protect children who, despite such services, nonetheless must be placed in foster care." H.R. Rep. No. 136, 96th Cong., 1st Sess. 28 (1979). As part of its "major restructuring" of existing law, S. Rep. No. 336, *supra*, at 1, Congress amended the definition of "child welfare services" in Title IV-B of the Social Security Act to include services aimed at "preventing the unnecessary separation of children from their families," and "restoring to their families children who have been removed." 42 U.S.C. 625(a)(1)(C) and (D). Congress also required States to implement a program of family reunification services and preplacement preventive services in order to qualify for a variety of federal funds. 42 U.S.C. 627(a)(2)(C) and (b)(3); 42 U.S.C. 672(d).

In the provision at issue here, Congress created the "reasonable efforts" requirement, while other provisions required States to develop individual "case plan[s]" and "case review system[s]" to ensure periodic review of the status of foster care children. 42 U.S.C. 672(a)(15) and (16). The Act thus "mark[ed] an historic shift in the thrust of Federal policy away from foster care * * * toward permanent arrangements for children, involving the retaining of the children in their own homes, * * * bringing their homes back together * * * and encouraging the adoption of children who are able to be adopted."

125 Cong. Rec. 29,504 (1979) (remarks of Sen. Moynihan).

Congress recognized that the Act was an "ambitious undertaking" in an area not susceptible to "dramatic or complete" cures. 126 Cong. Rec. 14,645 (1980) (remarks of Rep. Conable). In keeping with that observation, the Senate Report acknowledged that "substantial progress [toward permanent placement of children] cannot be achieved by Federal fiat but can come about only through concerted effort and commitment on the part of State and local governments which have primary responsibility for carrying out these programs." See S. Rep. No. 336, *supra*, at 16. Recognizing that the new approach would take time to implement, Congress delayed the effective date of the "reasonable efforts" requirement until October 1, 1983, 42 U.S.C. 671(a)(15), 672(a)(1), and refrained from spelling out specific services that States must provide.[9] The philosophy underlying these steps is reflected in the House Report's statement that "the entire array of possible preventive services are not appropriate in all situations. The decision as to the appropriateness of specific services in specific situations will have to be made by the administering agency having immediate responsibility for the care of the child." H.R. Rep. No. 136, *supra*, at 47.

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[9] The House bill, as originally passed, did not have a "reasonable efforts" provision, but would have required a participating State to have in place programs to deliver "adequate preventive services" and "family reunification" services, and listed specific types of services that a State "may" provide to satisfy those requirements. H.R. 3434, 96th Cong., 1st Sess. (1979); H.R. Rep. No. 136, *supra*, at 5, 46-47, 79. Even those suggested criteria, however, were not enacted into law. State social services representatives urged the Senate "[t]o emphasize objectives rather than mandate too highly specific procedures upon the States," *Proposals Related to Social and Child Welfare Services, Adoption Assistance, and Foster Care: Hearing Before the Subcomm. on Public Assistance of the Senate Comm. on Finance*, 96th Cong., 1st Sess. 118 (1979) (testimony of Barbara B. Blum), and the Act as passed by both Houses accords with that approach. H.R. Conf. Rep. No. 900, 96th Cong., 2d Sess. 56-57 (1980).

2. The Secretary's administration of the Act confirms that the "reasonable efforts" requirement is not sufficiently specific to give rise to an enforceable right under Section 1983. As noted above, the regulations under Section 671(a)(15) are extremely general; they do not impose specific standards that a State must follow. 45 C.F.R. 1356.21(b), 1357.15(e)(2). The history of those regulations shows that this choice was deliberate.

The Secretary's original notice of proposed rulemaking indicated that States could meet the "reasonable efforts" requirement by satisfying proposed regulations dealing with reunification and preplacement preventive services under the Title IV-B program. 45 Fed. Reg. 86,823 (1980). Those services, in turn, were defined in the proposed regulation with a great deal of specificity. As to reunification services, States would have to provide "day care services, homemakers or caretaker services, family or individual counseling for parent(s) and child * * *, and other * * * necessary and appropriate [services]." *Id.* at 86,829. As to preplacement preventive services, the proposed rules would have mandated "twenty-four hour emergency caretaker and homemaker services; day care; crisis counseling; individual and family counseling; emergency shelters; and access to emergency financial assistance and arrangements for the provision of temporary child care to provide respite to the family for a brief period." *Id.* at 86,823.

On July 15, 1982, however, the Secretary withdrew this proposal. 47 Fed. Reg. 30,932. The Secretary explained that "the proposed regulations contained a number of provisions that, we now believe, would unduly limit State flexibility or impose unjustifiable costs. The proposal has therefore been thoroughly evaluated and revised and inappropriate provisions have been eliminated." *Id.* at 30,934. The new proposal "remove[d] many of the detailed and specific requirements" in the original proposal. *Ibid.* The Secretary noted that, where the language of the Act was not highly explicit, the Act "sug-

gests [that] Congress chose to leave discretion to the Secretary." *Ibid.* Exercising that discretion, the Secretary determined "to permit States flexibility in implementing these sections of the statute." *Ibid.* The proposal would have defined "reasonable efforts" as the States having preplacement and family reunification programs in place that met only the general requirements of 42 U.S.C. 627 (a)(2)(C) and (b)(3) of the Title IV-B program. *Id.* at 30,935; see also *id.* at 30,941 (setting forth proposed rule). In commenting on those requirements, the Secretary stated that HHS intended "to leave the decision on the nature and content of the reunification and placement preventive services programs to the States." *Id.* at 30,938.

The final rule, however, retreated even from that requirement, in favor of giving the States greater freedom to determine how to make "reasonable efforts." 48 Fed. Reg. 23,104 (1983). The Secretary explained that state agencies had criticized the prior proposal for ignoring that "[i]n these times of limited resources and substantial service demands, * * * States must have wide latitude to develop resource priorities and service choices." *Id.* at 23,106-23,107. The Secretary agreed with the States, explaining:

> The Department believes that it is an inappropriate and unnecessary Federal intrusion to dictate nationally a specific set of services which may or may not address a particular State's situation. Moreover, the Department believes that it is essential to give the States the flexibility and responsibility for these service decisions.

Id. at 23,107. The final rule took that concern into account, and established the requirement that individual case plans should reflect the "reasonable efforts" made. *Id.* at 23,106-23,107.[10]

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[10] Recognizing the need for "information and guidance to the States" in this area, the Department stated that it intended to issue "non-binding informational materials which will discuss preplace-

The Secretary's considered decision to permit the States broad freedom in devising their programs, in line with their resources and the needs of particular families, is a reasonable construction of the Act entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In that context, to allow federal courts to interpret the meaning of the general "reasonable efforts" requirement in Section 1983 actions would interfere not only with state child welfare programs, but with the decisions of Congress and the Secretary to leave discretion to the States.

D. "Reasonable Efforts" Litigation Under Section 1983 Would Require Federal Courts To Interpret A Vague Statute In A Field Of Particular State Concern, And In Which Federal Courts Are Particularly Inexperienced

The application of Section 1983 in this case is particularly troubling because it launches the federal courts into a field from which they have historically abstained, and in which they have little institutional competence. Domestic relations is a traditional province of the States and state courts. The limited federal intervention brought about by the Act was specifically entrusted to an expert agency and to the family courts of the States. Those considerations suggest that heightened attention be given in this case to the rule that federal duties must be "specific and definite" before they will create "rights" enforceable in federal court actions under Section 1983.

1. The entire field of domestic relations has, throughout the history of our Nation, been the special preserve of the States; federal courts have little or no experience with

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ment preventive and reunification services and 'reasonable efforts.'" 48 Fed. Reg. 23,107. "[I]n the interim," the Department noted, "States may want to consider inclusion of the services listed in 45 C.F.R. 1357.15(e) as they move towards implementing the 'reasonable efforts' and service program requirements of the Act." *Ibid.*

matters pertaining to family law. In *Barber* v *Barber*, 62 U.S. (21 How.) 582, 584 (1859), the Court "disclaim[ed] altogether any [federal court] jurisdiction" over domestic relations suits. Later, in *Ex parte Burrus*, 136 U.S. 586 (1890), this Court held that a federal district court could not issue a writ of habeas corpus to return a child to the custody of her father when the child was being illegally held by her grandparents. The Court stated that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Id.* at 593-594. In line with these holdings, federal courts, even when diversity jurisdiction exists, will not determine child custody because an inquiry into the best interests of a child—the touchstone of custody determinations—"is within the peculiar province, experience, and competence of the state courts." *Bennet* v. *Bennet*, 682 F.2d 1039, 1042-1043 (D.C. Cir. 1982).

The respect for state competence in domestic relations applies even where federal statutes are involved. For example, in *Thompson* v. *Thompson*, 484 U.S. 174 (1988), the Court refused to hold that the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. 1738A, creates an implied private right of action for a federal court to determine which of two conflicting state custody decrees is valid. The Court explained that such actions would "entangle [federal courts] in traditional state-law questions that they have little expertise to resolve." 484 U.S. at 186.[11]

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[11] See also *Moore* v. *Sims*, 442 U.S. 415, 435 (1979) (abstaining from the adjudication of a constitutional attack on a state child welfare statute during the pendency of state proceedings because "[f]amily relations are a traditional area of state concern"); *United States* v. *Yazell*, 382 U.S. 341, 352 (1966) ("Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements."); *De Sylva* v. *Ballentine*, 351 U.S. 570, 580 (1956) (applying state domestic law under a federal statute because "there is no

As a consequence, federal judges have little if any experience or expertise upon which they could draw in performing the formidable task of giving content to the requirement that a state agency make "reasonable efforts" to preserve families before and after removing a child from its home. When a Section 1983 action would entangle the federal judiciary so deeply into an area traditionally reserved to the States, and as to which federal judges lack expertise, this Court should hesitate to find that an open-ended federal statutory requirement, such as "reasonable efforts," is "sufficiently specific and definite" to create an enforceable right. *Wright*, 479 U.S. at 432.

2. The Adoption Act, of course, does create federal requirements in the field of child welfare, and to that extent involves the federal government in affairs traditionally governed solely by the States. But rather than expecting that the responsibility for interpreting the "reasonable efforts" requirement would fall to federal courts in Section 1983 actions, it seems far more likely that Congress intended the "reasonable efforts" requirement to be developed by the authorities that would have the competence to enforce it: the Secretary and the state courts. That is, of course, what the Act does. First, it gives the Secretary the power to enforce the "reasonable efforts" requirement by disapproving any state plan that does not meet the Act's requirements, or by withholding funds from States that do not "substantial[ly]" comply with approved plans. 42 U.S.C. 671(b). The Secretary is in a position to make expert judgments as to whether a State is putting forth "reasonable efforts," and whether any failure to comply is "substantial." Particularly in light of the Secretary's determination that the "reasonable efforts" requirement is not susceptible of detailed, national definitions, but must be applied by the States in light of all of the circumstances of each individual case, it is dif-

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federal law of domestic relations, which is primarily a matter of state concern").

ficult to imagine that the Act envisions a supplementary role for the federal courts under Section 1983.[12]

Second, the Act expressly dictates that state courts will play a role in giving content to the "reasonable efforts" requirement "in each case." 42 U.S.C. 671(a)(15). The Act provides that the federal government will reimburse the States for foster care payments only if "the removal from the home * * * was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of [the] child and * * * that reasonable efforts of the type described in section 671(a)(15) * * * have been made." 42 U.S.C. 672(a)(1). Such a determination is to be made by the appropriate court when the state agency seeks to remove the child from his home. See also 42 U.S.C. 675(5)(B) and (C) (requiring periodic review and dispositional hearing by an administrative body or a court). It is evident, therefore, that Congress looked to state courts as primary enforcers of the "reasonable efforts" requirement.[13] States

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[12] To permit Section 1983 actions here would undermine the values underlying the rule of *Chevron*—that courts should respect the exercise of agency expertise and defer to the permissible policy judgments of politically accountable bodies. 467 U.S. at 865-866. Where permitting a Section 1983 action would disrupt the proper relationships among the court, the agency, and the regulated entities, courts should not find an open-ended statutory requirement (such as the provision for "reasonable efforts"), which has not been further defined by the agency, to create an "enforceable right" within the meaning of Section 1983. See Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. Chi. L. Rev. 394, 416-417, 428-430 (1982).

[13] The Senate Report expressed confidence that the judicial-determination provision would provide "an important safeguard against inappropriate agency action." S. Rep. No. 336, *supra*, at 16. In response to the suggestion that "the judicial determination requirement can become a mere *pro forma* exercise in paper shuffling to obtain Federal Funding," the Report was "unwilling to accept as a general proposition that the judiciaries of the States would so lightly treat a responsibility placed upon them by Federal statutes for the protection of children." *Ibid.*

characteristically provide a specialized juvenile or family court that acquires considerable expertise in child custody matters; such courts are in a far better position than generalist federal courts to determine whether "reasonable efforts" have been made to prevent the breakup of the family.[14]

To insert federal judges into the "reasonable efforts" inquiry would disrupt the careful scheme created by Congress and the Secretary. It would mean that federal judges, largely inexpert in custody matters, would review the discretionary decisions of state agencies, create specific standards that they must meet, and bypass the Secretary's determination that it is unwise and unworkable to interpret "reasonable efforts" to mandate particularized standards as a matter of law. The federal courts are not competent bodies to perform that task. There is no consensus among policy makers or child welfare experts as to how Congress's goal of "reasonable efforts" might best be achieved.[15] Answers can be gathered more readily

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[14] The Secretary has also determined to rely on state courts to enforce the "reasonable efforts" requirement. In auditing state programs for purposes of reimbursing foster care maintenance payments under 42 U.S.C. 472(a), HHS reviews the case file to see that a state judge has determined that such efforts have been made. See HHS, *Policy Interpretation Question*, ACYF-PIQ-86-02, at 3-4 (May 8, 1986); HHS, *Financial Review Guide for On-Site Reviews of the Title IV-E Foster Care Program*, Att. A (Eligibility Checklist), at 3 ¶ 16.b (Aug. 1985). See also ABA Young Lawyers Division, *Reasonable Efforts To Prevent Foster Placement* 37 (June 1985).

[15] For example, one article observed that there is "confusion" and "considerable debate" about "family-centered placement prevention services," and went on to identify "three distinct models—crisis intervention, home-based, and family treatment—each having its own philosophical assumptions, theoretical models, and organizational or structural features." Nelson, Landsman & Deutelbaum, *Three Models of Family-Centered Placement Prevention Services*, 59 J. Child Welfare League 3, 3-4 (1990), *reprinted in Federally Funded Child Welfare, Foster Care, and Adoption Assistance Programs: Hearing Before the Subcomm. on Human Resources of the*

through the work of an expert agency or the accumulated experience of specialized state tribunals than through adversary litigation. To determine what constitutes "reasonable efforts" in this policy-laden area requires both a level of expertise that federal courts lack and basic policy choices that are by their nature not entrusted to the Article III branch. Against that background, the "reasonable efforts" requirement is too vague and amorphous to create a "right" that federal courts are competent to enforce under Section 1983.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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House Comm. on Ways and Means, 101st Cong., 2d Sess. 114, 115-116 (1990). A federal court is ill equipped to determine which, if any, of those models would best comport with a "reasonable efforts" requirement.

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Supreme Court of the United States

OCTOBER TERM, 1991

SUE SUTER, *et al.*,
Petitioners,

v.

ARTIST M., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, AND NATIONAL CONFERENCE OF STATE LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Section 671(a)(15) of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(a)(15), provides that, for States to be eligible to receive federal foster care assistance funds, they "shall have a plan approved by the Secretary [of Health and Human Services] which * * * provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home." The question presented in this case is as follows:

Whether Section 671(a)(15) creates a right to the exercise of "reasonable efforts" that may be effectuated in federal court under 42 U.S.C. § 1983.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1488

SUE SUTER, *et al.*,

Petitioners,

v.

ARTIST M., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, AND NATIONAL CONFERENCE OF STATE LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling and continuing interest in the issue presented here: when federal spending statutes create rights that are enforce-

able against state and local governments under 42 U.S.C. § 1983.

This case concerns Section 671(a)(15) of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(a)(15), which makes it a condition for the receipt of federal foster care assistance payments that States adopt plans providing for the exercise of "reasonable efforts" to prevent the removal of children from their homes. The courts below held that this provision confers a right upon the affected children, cognizable in federal court under Section 1983, to demand the exercise of such "reasonable efforts."

Amici and their members will be directly affected by the Court's decision about the scope of Section 671(a)(15). *Amici* also have a broader interest in the law governing Section 1983 actions that challenge the administration of federal spending programs. For these reasons, *amici* submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT OF THE CASE

1. In 1980 Congress enacted the Adoption Assistance and Child Welfare Act of 1980 (the "AAA" or the "Act"), P.L. 96-272, codified at 42 U.S.C. §§ 620-628, 670-676, which amended the Social Security Act by adding a new Title IV-E to assist States in providing foster care to neglected and abused children. Under the cooperative federal-state venture established by the Act, States that have filed required plans approved by the Secretary of Health and Human Services (the "Secretary") may receive federal matching funds for certain foster care maintenance payments. Section 672(a) provides that a State may make such payments only to chil-

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[1] The parties' letters of consent pursuant to Rule 37.3 of the Rules of this Court have been filed with the Clerk of the Court.

dren "remov[ed] from the home of a relative" pursuant to voluntary agreement or a court order.

The central issues in this case involve Section 671, which specifies the requirements that a state plan must meet to qualify a State for participation in the federal-state program. That section provides in relevant part:

> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—
>
> * * * *
>
> (15) * * * provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

42 U.S.C. § 671(a)(15).

2. Petitioner Sue Suter is the administrator of a state agency, the Illinois Department of Children and Family Services ("DCFS"), that is responsible for investigating complaints regarding neglected and abused children and for providing, where appropriate, protective services, including foster care, to such children. Pet. App. 2a, 33a. The responsibilities accorded the DCFS by state law are immense. In fiscal year 1990 the DCFS received 255,887 calls on its "State Central Register" hotline reporting possible cases of abuse. Illinois Department of Children and Family Services, Executive Summary 1 (July 1990). In Cook County alone it was called upon to investigate 26,604 cases of alleged abuse and neglect that year. *Id.* at 6.

On December 14, 1988, respondents initiated a class action suit under 42 U.S.C. § 1983 as well as directly under the AAA against petitioner in her official capacity,[2]

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[2] Petitioners also include Suter's predecessors, Jess McDonald and Gordon Johnson, as well as Gary T. Morgan, DCFS Guardianship Administrator.

seeking declaratory and injunctive relief. Respondents alleged that the DCFS violated the "reasonable efforts" provision of Section 671(a)(15) of the Act by failing to assign caseworkers to children under its care in a timely manner. Pet. App. 32a-33a. The United States District Court for the Northern District of Illinois certified two classes. The first (class A) consisted both of Cook County children in the direct custody of the DCFS and of children who remained at home under DCFS supervision. The second (class B) included only those children directly in DCFS custody. Pet. App. 32a.

Following class certification, petitioners moved for dismissal of respondents' complaint on the grounds, *inter alia*, that the "reasonable efforts" provision of Section 671(a)(15) does not create rights that are enforceable under Section 1983. Similarly, petitioners argued that there is no implied right of action directly under the AAA. Finally, petitioners sought dismissal of the complaint as to Class A, which includes children not in foster care and for whose care the State receives no funds under the AAA. Pet. App. 34a.

In a decision rendered on November 21, 1989, the district court rejected each of these arguments. The court reasoned that because other courts had held that other provisions of the AAA create enforceable rights, Section 671(a)(15) likewise creates such rights. Pet. App. 42a. Similarly, the court concluded that because this Court had held in *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), that the word "reasonable" in the context of a statute permitting a "reasonable allowance" for utility charges to be included in a tenant's rent was not too "vague and amorphous" to be enforceable under Section 1983, the term "reasonable efforts" is sufficiently precise to be enforceable. Pet. App. 43a. Finally, the court held that there exists an implied

right of action directly under the AAA for violation of Section 671(a)(15)'s requirements.[3] Pet. App. 35a-41a.

Having determined that the plaintiffs had stated a cause of action, on March 2, 1990, the court issued a preliminary injunction requiring the DCFS to assign caseworkers to each of the individuals in the plaintiff classes "within three working days." Pet. App. 55a. The court's ruling made no distinction between children in Classes A and B even though Class A includes children who have not been removed from the home pursuant to section 672. *Ibid.*

A divided panel of the Court of Appeals for the Seventh Circuit affirmed. Applying the three-part test articulated in *Wilder* v. *Virginia Hospital Association*, 110 S. Ct. 2510 (1990), the court held that Section 671(a)(15) creates an enforceable right under Section 1983. Pet. App. 10a. The court reasoned that Section 671(a)(15) "imposes a binding obligation on the state" that is intended "to benefit children such as those in the plaintiff classes." Pet. App. 10a. The court also held that the term "reasonable efforts" is not too vague and amorphous to be judicially enforceable. *Id.* at 11a. Because the court found no evidence that Congress intended to foreclose a remedy under Section 1983, the court affirmed the district court's holding that Section 671(a)(15) is enforceable in an action under Section 1983.[4] Pet. App. 13a-14a.

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[3] The court granted petitioners' motion to dismiss as to respondents' constitutional due process claim, Pet. App. 47a-48a, a decision not presently before this Court. *Id.* at 1a n.2.

[4] The court of appeals also affirmed the district court's judgment that the AAA implicitly authorizes a private right of action (Pet. App. 14a) and that children living at home could maintain an action under the AAA, explaining that "the language of the statute does not reveal an intention by Congress to limit its terms only to children actually in foster care outside the home."

Judge Manion dissented. Pet. App. 20a. Suggesting that "*Wilder's* holding relates to a statutory provision and facts discernably different from that of the present situation," Judge Manion concluded that this case should be decided under "the more applicable legal standards and reasoning of *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981)." Pet. App. 21a. Judge Manion believed that because the "reasonable efforts provision "creates no specific mandate" and "relates to the overall reasonableness of every aspect of the foster care program," there "is nothing for the court to determine as being reasonable or unreasonable." *Id.* at 24a. Finally, Judge Manion reasoned that because of the open-ended character of the term "reasonable efforts," the provision fails to create an enforceable right under *Pennhurst* because its language does not "unambiguously notify Illinois of the conditions it must meet in order to receive federal help." Pet. App. 26a.

SUMMARY OF ARGUMENT

I. As an initial matter, the court of appeals went astray in determining the existence of a "right" through application of the three-part test set out in *Golden State Transit Corp.* v. *City of Los Angeles*, 110 S. Ct. 444, 448 (1989). That test is properly used when the statute at issue imposes unconditional duties directly on a unit of government. But it is not, at least as a general matter, appropriately applied when federal-state funding statutes are asserted to create rights within the meaning of 42 U.S.C. § 1983, because such funding provisions are "in the nature of a contract." *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). Spending programs like the AAA thus are, in essence, federal-state contracts in which the parties to the agreement have undertaken to assist third-party beneficiaries. And it is most unlikely that the drafters of Section 1983 would

have understood the terms of such a contract to create rights enforceable by the third party beneficiaries. To the contrary, it was generally accepted at the time of the enactment of Section 1983's predecessor that—with the exception of contracts where the third-party itself performed consideration—such beneficiaries could not sue on contracts.

Having said this, of course, we recognize that the Court applied the *Golden State* test to hold that the spending provision at issue in *Wilder* v. *Virginia Hospital Association*, 110 S. Ct. 2510 (1990), created rights under Section 1983. But that program differed materially from a typical spending statute of the sort at issue here. The statute invoked in *Wilder* funneled federal funds directly to the plaintiffs in return for their provision of services; viewed in contractual terms, the *Wilder* plaintiffs had performed consideration that entitled them to federal moneys. And that is precisely the sort of three-party arrangement in which, at the time of Section 1983's enactment, the third-party beneficiary would have been permitted to seek enforcement of the contract's terms.

II. If Section 671(a)(15) does create rights, by its plain terms it guarantees only that a State "shall have a plan" for the disbursement of federal funds that describes the measures the State will take to minimize foster care. Nothing in the statute itself requires that States engage in any specific substantive measures. This understanding of the statute's scope is confirmed by the implementing regulations, which provide that States are in compliance with the reasonable efforts requirement when they have plans that describe the services provided. And in this regard, Section 671(a)(15) stands in sharp contrast to the statute at issue in *Wilder*, which imposed express, substantive requirements on participating States.

III. Finally, Section 671(a)(15)—even if it confers a right to the *exercise* of reasonable efforts—is too vague and amorphous to be judicially enforceable under Section 1983. A judicial determination of the reasonableness of the State's efforts inevitably would necessitate a review of the State's decisions regarding enforcement policy and the allocation of resources. In closely related contexts, the Court has indicated that such inquiries are outside the competence of the judiciary. See *Heckler* v. *Chaney*, 470 U.S. 821 (1985). And again, the statute here differs dramatically from the one at issue in *Wilder*, which was deemed enforceable because it provided objective benchmarks against which to gauge the State's performance.

ARGUMENT

SECTION 671(a)(15) OF THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980 DOES NOT CREATE RIGHTS THAT ARE ENFORCEABLE UNDER 42 U.S.C. § 1983

It is common ground between the parties in this case that not all violations of federal law are cognizable under 42 U.S.C. § 1983. Instead, as the Court has emphasized repeatedly, "Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law." *Golden State Transit Corp.* v. *City of Los Angeles*, 110 S. Ct. 444, 448 (1989). See *Dennis* v. *Higgins*, 111 S. Ct. 865, 871 (1991); *Wilder* v. *Virginia Hosp. Ass'n*, 110 S. Ct. 2510, 2517 (1990); *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 28 (1981). The dispositive issue here, then, is whether Section 471(a)(15) of the AAA, 42 U.S.C. § 671(a)(15), "creates a 'federal right' that is enforceable under § 1983." *Wilder*, 110 S. Ct. at 2517. Although it purported to ask that question, in our view the court below went fundamentally astray both in identifying the considerations relevant to its answer and in conducting its analysis of those considerations.

I. FEDERAL SPENDING PROGRAMS GENERALLY DO NOT CREATE RIGHTS THAT ARE ENFORCEABLE BY THE PRIVATE BENEFICIARIES OF THOSE PROGRAMS

1. The court of appeals assumed (see Pet. App. 10a), without analysis, that the question whether Section 671(a)(15) of the AAA creates rights within the meaning of Section 1983 should be answered by looking to the three considerations identified in *Dennis*, *Golden State*, and *Wilder*: whether the statute was designed to benefit the putative plaintiffs, imposes binding obligations on the defendant governmental unit, and is not " 'too vague and amorphous' [as] to be 'beyond the competence of the judiciary to enforce.' " *Golden State*, 110 S. Ct. at 448 (quoting *Wright* v. *Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 431-432 (1987)). See *Dennis*, 111 S. Ct. at 871; *Wilder*, 110 S. Ct. at 2517. The *Golden State* test, however, is not the appropriate one to apply here.

When a statute (or constitutional provision) imposes unconditional duties directly on a unit of government, as was true in *Dennis* and *Golden State*, we agree—as we argued in *Golden State* (see Br. for National League of Cities, *et al.*, No. 88-840, at 14-19)—that application of the three-part test is appropriate. That approach plainly accords with the intent of Congress when it enacted Section 1983 in 1871. The legislative debates did not address the sorts of statutes that were thought to create "rights."[5] The term, however, had an accepted meaning at the time: rights were understood to embrace those things that could " 'be lawfully claimed' " (Cong. Globe, 42d Cong., 1st Sess. 313 (1871) (remarks of Rep. Burchard) (citation omitted)), encompassing "an en-

[5] That is hardly surprising, since deprivations of rights secured by law were not made actionable under Section 1983's predecessor until 1874. See *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608-609 (1979).

forceable claim or title to any subject matter whatever." W. Anderson, *A Dictionary of Law* 905 (1893). While there is an element of circularity to this definition—a right was an enforceable claim, while the enforceability of a claim turned on whether it asserted a right—rights plainly were understood to flow from those laws that imposed direct and unconditional proscriptions for the benefit of particular individuals. The courts of the time in fact recognized common law rights of action only under such statutes. See, *e.g.*, *Hayes* v. *Michigan Central R.R. Co.*, 111 U.S. 228, 240 (1884); *Pollard* v. *Bailey*, 87 U.S. (20 Wall.) 520, 527 (1874); T. Cooley, *Law of Torts* 790 (2d ed. 1888).

At the same time, the history suggests that the *Golden State* test should not, at least as a general matter, govern the identification of rights under what the Court has termed "a mere federal-state funding statute." *Pennhurst*, 451 U.S. at 18. As the Court has explained, federal "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.* at 17. In particular, a spending program such as the AAA is, in essence, a federal-state contract in which the parties to the agreement have undertaken to assist third-party beneficiaries, which in this case include respondents. And it is most unlikely that the drafters of Section 1983 would have understood the terms of such a contract to create rights enforceable by the third party beneficiaries.

To the contrary, at the time of the enactment of Section 1983 it was generally accepted that—with the exception of contracts where the beneficiary was owed a preexisting duty by the promisee, usually as the result of performance amounting to consideration by the benefici-

ary—third party beneficiaries could not sue on contracts. As Story explained long before the enactment of Section 1983's predecessor:

> It is now well settled, as a general rule, though the early cases are quite contradictory on this point, that in cases of simple contract, if one person makes a promise to another for the benefit of a third, although no consideration move from such third person, it is binding * * *. The principal difficulty seems to be in determining in which party the right of action resides. *As between the plaintiff and defendant, there must be a privity of contract*, and if the plaintiff be a mere stranger to the consideration, and no promise be made by the defendant to him, founded in privity upon it, the action is not maintainable by him, although a promise have been made by the defendant to pay the plaintiff.

W. Story, *A Treatise on the Law of Contracts Not Under Seal* 82-83 (1844, reprint ed. 1972) (emphasis added) (footnotes omitted).

This proposition was uniformly accepted at the time. Writing almost contemporaneously with the enactment of Section 1983's predecessor, for example, Langdell concluded that "[a] binding promise vests in the promisee, and in him alone, a right to compel performance of the promise, and it is by virtue of this right that an action is maintained upon the promise." C. Langdell, *A Summary of the Law of Contracts* 79 (2d ed. 1880). Langdell also observed "that a person for whose benefit a promise was made, if not related to the promisee, could not sue upon the promise," adding that this "proposition is so plain upon its face that it is difficult to make it plainer by argument." *Ibid.*[6] Not surprisingly, then, this Court

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[6] This proposition was widely acknowledged. See, *e.g.*, J. Clark Hare, *The Law of Contracts* 193 (1887) ("It is equally well settled, on a principle common to every system of jurisprudence, that the obligation of a contract is under ordinary circumstances confined to

recognized at the time "the general rule that privity of contract is required" to support an action for enforcement. *National Bank* v. *Grand Lodge*, 98 U.S. 123, 124-125 (1878).[7]

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the parties, and cannot be enforced by third persons."); 1 F. Hilliard, *The Law of Contracts* 422 (1872) ("In general, the party with whom a contract is made is the proper plaintiff in a suit upon such a contract, although the beneficial interest is in other persons."); *id.* at 426-427 (noting exceptions to rule but affirming that action cannot be maintained "where the contract is made by a sealed instrument"); 1 W. Story, *A Treatise on the Law of Contracts* 509 (M. Bigelow ed. 1874) ("tendency of the courts" in the United States is to hold "that no stranger to the consideration can take advantage of a contract, though made for his benefit"); 2 F. Wharton, *A Commentary on the Law of Contracts* 155 (1882) ("no one can sue on a contract to which he was not a party"); *id.* at 156-157, 162-170. Indeed, it appears that the rights of donee beneficiaries were not established in the United States until well into the twentieth century. See K. Teeven, *A History of the Anglo-American Common Law of Contract* 230 (1990).

A similar rule was recognized under English common law in the nineteenth century. Although earlier cases had suggested that a child could sue as a beneficiary under a contract made on its behalf by a parent (see A. Farnsworth, *Contracts* § 10.2 at 712 (1982)), that exception was repudiated in 1861 in a case that affirmed the vitality of the rule precluding third parties from recovering on contracts. *Tweddle* v. *Atkinson*, 1 B. & S. 393, 121 Eng. Rep. 762 (1861). As one Lord explained in subsequently reaffirming *Tweddle*, "in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it." *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.*, [1915] App. Cas. 847, 853. While plaintiffs occasionally may obtain third party contractual benefits in courts of equity, it remains the rule in England that third party beneficiaries generally have no rights at law. See A. Farnsworth, *supra*, § 10.2 at 713.

[7] While there were narrow exceptions to this rule, virtually all cases recognizing such exceptions involved plaintiffs who either were related to the promisee or who themselves had performed services amounting to consideration. See 2 F. Wharton, *supra*, at 162-63 (discussing seeming exceptions and noting that most can be explained on other grounds than a general right to recovery by unrelated third parties). This accounts for occasional suggestions in

2. This background has obvious relevance here. It has long been established, of course,

> that in enacting § 1983, Congress did not intend to override well-established immunities or defenses under the common law. "One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary."

Will v. *Michigan Department of State Police*, 491 U.S. 58, 67 (1989), quoting *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). And that presumption must be applied with special force when a departure from the common law approach would impose significant obligations or liabilities on the States (see, *e.g.*, *Will*, 491 U.S. at 65-66; *Gregory* v. *Ashcroft*, 59 U.S.L.W. 4714 (U.S. June 20, 1991))—as almost inevitably will be the case if a State's failure to comply with the terms of a spending program is actionable. See generally *Pennhurst*, 451 U.S. at 24-25. Against this background, a Congress that understood rights to be *enforceable* entitlements could not

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the cases that "the right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, * * * is now the prevailing rule in this country." *Hendrick* v. *Lindsay*, 93 U.S. 143, 149 (1876). In *Hendrick* itself the plaintiff had executed a bond in reliance on a promise by the defendant to another that if the latter secured a bond to delay execution of judgment the defendant would guarantee the issuer against loss. Thus, the plaintiff suing in *Hendrick* had essentially been in privity with the parties to the contract and had provided consideration. *Id.* at 146-148. And, as discussed in text, whatever exceptions existed the treatise writers of the day—including such leading figures as Story and Langdell—uniformly agreed that the general rule was that only those from whom consideration had moved could themselves sue for performance on a contract.

have intended Section 1983 to authorize actions on the part of the third party beneficiaries of spending programs, when such beneficiaries generally were not entitled to seek performance under the common law.

This analysis is not novel; the Court, and individual Justices, have expressed considerable skepticism in the past that spending programs generally create enforceable rights under Section 1983. Noting that the spending provisions there at issue simply regulated the assurances provided by the State to the federal government about the State's use of federal funds, the Court in *Pennhurst* declared it "at least an open question whether an individual's interest in having a State provide those 'assurances' is a 'right secured' by the laws of the United States within the meaning of § 1983." 451 U.S. at 28. And the four dissenting Justices in *Wilder*, explaining that the provision before the Court simply set out one of the requirements for the plan pursuant to which the State would disburse federal funds, concluded that the statute "is addressed to the States and merely establishes one of many conditions for receiving Federal Medicaid funds; the text does not clearly confer any substantive rights on Medicaid services providers." 110 S. Ct. at 2527 (Rehnquist, C.J., O'Connor, Scalia, Kennedy, JJ., dissenting).

Having said this, we recognize that the Court applied the *Golden State* test to hold that the spending provision at issue in *Wilder* created rights within the meaning of Section 1983. But that program differed materially from "a typical funding statute" of the sort at issue here. *Pennhurst*, 451 U.S. at 22. The provision at issue in *Wilder*, the Boren Amendment, 42 U.S.C. § 1396a (a)(13)(A), was part of a federal-state scheme pursuant to which, among other things, hospitals (the plaintiffs in *Wilder*) provided medical services to needy persons;

the federal government offered funds to the States, which in turn agreed to use them to reimburse health care providers "for the medical services provided to needy individuals." *Wilder*, 110 S. Ct. at 2513. See *id.* at 2515-2516. In contrast to Section 671(a)(15) of the AAA, the Boren Amendment thus channeled federal funds directly into the hands of third parties—and did so in return for services rendered by those parties. Viewed in contractual terms, the hospitals provided consideration in the form of medical services. And that is precisely the sort of three-party arrangement in which, at the time of Section 1983's enactment, the third party beneficiary would have been permitted to seek enforcement of the contract's terms. See *National Bank*, 98 U.S. at 124 (stating that one "exception" to the general requirement of privity is "where one person contracts with another to pay money" directly to a third); Hare, *supra*, at 193, 197 (recognizing that the principle permitting one who has offered consideration to sue creates an exception to the general requirement of privity). While the Court's decision in *Wilder* concededly did not advert to the common law background in holding that the Boren Amendment created enforceable rights in the hospitals, the decision's analysis and outcome is wholly consistent with Section 1983's history.[8]

That is not true of the holding below. While the AAA was undoubtedly intended to benefit persons like respondents, they are classic donee beneficiaries; in contrast to the program at issue in *Wilder*, Section 671(a)(15)

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[8] Here, unlike *Wilder*, the statutory provision at issue requires—at most—that money be spent on services that would indirectly benefit respondents. Significantly, respondents conceded below that petitioners have not violated Title IV-B welfare provisions, see *infra* note 10, nor do they allege that DCFS has failed to provide them with food or clothing.

plainly does not require those beneficiaries to provide consideration of the sort that nineteenth century lawmakers would have understood to support the recognition of enforceable rights. Nothing in the language or history of the AAA, moreover, alters that conclusion. To the contrary, the congressional declaration of purpose that is prefixed to section IV-E of the Social Security Act declares that the federal foster care payments authorized by the AAA are made "[f]or the purpose of *enabling* each State to provide, in appropriate cases, foster care * * * and adoption assistance for children." 42 U.S.C. § 670 (emphasis added). And as the authorization section of the Act makes clear, those funds are provided "[f]or the purpose of enabling the United States, through the Secretary, to cooperate with State public welfare agencies in establishing, extending, and strengthening child welfare services." 42 U.S.C. § 620. This is language of agreement rather than of rights. Cf. *Pennhurst*, 451 U.S. at 18, 20.

II. SECTION 671(a)(15) DOES NOT CREATE RIGHTS TO THE RECEIPT OF "REASONABLE EFFORTS"

A. Section 671(a)(15) Requires No More Than That States Adopt Individualized Case Plans.

1. For the foregoing reasons, Section 671(a)(15) simply does not create rights that are enforceable under Section 1983. If that conclusion is incorrect, however, the Court still must determine the *nature* of the right established by the statute. The court below simply assumed that the right created by Section 671(a)(15) is an entitlement to the *exercise* of reasonable efforts by state officials. See Pet. App. 10a-12a. But that assumption cannot be reconciled with the language, administrative interpretation, and legislative history of the statute.

Section 671(a) provides in relevant part:

> In order for a State to be eligible for payments under this part, *it shall have a plan approved by the Secretary* which—
>
> * * * *
>
> (15) * * * *provides* that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

42 U.S.C. § 671(a) (emphasis added). On its face, the statute requires only that States have individualized plans, approved by the Secretary, that describe the measures they are taking to minimize the need for foster care. Nothing in the statute itself requires that States engage in any specific substantive measures, or that they be required to undertake measures more stringent than those provided in their plans. If Section 671(a)(15) creates any right at all, then, it is to have the State draft a plan that contains the requisite provisions.

Needless to say, the statute should be read according to its plain terms. The Court did just that in *Pennhurst*; interpreting provisions requiring that state recipients of federal funds "provide * * * assurances" that the funds would be used in a particular manner (see 451 U.S. at 12-14), the Court indicated that any right created by the statute would support a claim only "that the state plan has not provided adequate 'assurances' to the Secretary." *Id.* at 28. See *id.* at 33 (opinion of Blackmun, J.) (noting "modest legal content" of assurances requirement). Similarly, the Boren Amendment at issue in *Wilder* requires States to adopt plans for the reimbursement of hospitals according to rates "which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate" (42 U.S.C. § 1396a(a)(13)(A)). The four dissenting Justices read the provision to create only a right to the specified findings and assurances (if

it created any rights at all) (see 110 S. Ct. at 2527) (Rehnquist, C.J., dissenting))—even though the language of that statute imposed considerably more stringent requirements on the States than does Section 671(a)(15) of the AAA.

In fact, it is instructive to compare the statute at issue in *Wilder* with the AAA. In rejecting the dissent's analysis, the *Wilder* Court relied entirely on the statutory language requiring States both to find and to make assurances that their rates were reasonable and adequate. See 110 S. Ct. at 2519-2520. The Court focused in particular on the findings requirement, explaining that "the only plausible interpretation of the [Boren] Amendment is that by requiring a State to *find* that its rates are reasonable and adequate, the statute imposes the concomitant obligation to adopt reasonable and adequate rates." *Id.* at 2520 (emphasis in original). The majority accordingly answered the United States' argument that the statute required only the provision of assurances by observing that "[t]his interpretation ignores the language of the statute that requires a State to *find* that its rates are 'reasonable and adequate * * *.'" *Id.* at 2519 n.11 (emphasis in original). Here, in contrast, the assertedly rights-creating provision imposes no such independent obligation on the States; it simply directs the States to "have a plan" that "provides" for the exercise of reasonable efforts.[9]

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[9] The *Wilder* Court also relied extensively on the legislative history of the Boren Amendment (see 110 S. Ct. at 2520-2522), which it found to "demonstrate[] clearly that Congress and the States both understood the Act to grant health care providers enforceable rights" (*id.* at 2522), adding that the legislative history was "replete with indications that Congress intended that States actually adopt rates that are 'reasonable and adequate.'" *Id.* at 2520 n.13. Here, in contrast, the statutory emphasis on state plans is consistent with the legislative history, which emphasizes the congressional intent to encourage state planning. As Senator Cranston, the sponsor of the Act in the Senate, explained with regard to the case plan require-

2. That Section 671(a)(15) creates a right only to adoption of an appropriate plan is confirmed by the construction accorded the statute by the Secretary of Health and Human Services—a construction that was wholly disregarded by the court below.[10] The Secretary's regulations generally require that, to receive federal funds, "a State *must have a state plan* approved by the Secretary that meets the requirements of * * * section 471(a) of the Act [that is, 42 U.S.C. § 671(a)]." 45 C.F.R. § 1356.20(a) (1990) (emphasis added). And "[i]n meeting the 'reasonable efforts' requirements" in particular (45 C.F.R. 1356.21(b)), the regulations require only that the plan "*include a description* of the services offered and the services provided to prevent removal of the child from the home and to reunify the family." 45 C.F.R. § 1356.21(d)(4) (1990) (emphasis added). The regulations thus indicate that no more is required from a state agency under Section 671(a)(15) than that the agency adopt case plans that describe the preventive services provided each child under the State's supervision.

This focus on the plan was a well-considered element of the regulatory structure. Indeed, in December 1980 the Secretary promulgated a set of proposed regulations

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ments incorporated in Section 671, "[t]his provision is intended to *assist* the States in focusing upon the problem of unnecessary long-term foster care and to facilitate a *planning process at the State level* for reducing long-term foster care." 125 Cong. Rec. 22682 (1979) (emphasis added); see also *id.* at 22683 ("Hopefully, these specific requirements will assist in providing the kind of focus for case plans that is missing under current law.").

[10] The court of appeals cited the regulations only once (see Pet. App. 7a n.10), and then only regulations that on their face apply exclusively to Title IV-B of the Act—the provisions of which are not involved here and which respondents below conceded have not been violated. See Plaintiffs' Response to Defendants' Motion to Dismiss, Dist. Ct. R. 60, at 20 n.8 ("[s]ince the class members who are under a protective order do not allege a violation of IV-B, the [HHS IV-B] policy statement is irrelevant.")

that would have imposed extensive, affirmative obligations on the States. See 45 Fed. Reg. 86817 (1980). But the Secretary subsequently withdrew the proposal, explaining that "the Department determined that a less prescriptive approach to implement the statutory requirements was advisable." 48 Fed. Reg. 23104 (1983). As the Secretary concluded, "the proposed regulations contained a number of provisions that, we now believe, would unduly limit State flexibility or impose unjustifiable costs." 47 Fed. Reg. 30934 (1982). Accordingly, "the Department's approach to development of th[e] final rule [was] to give the States *maximum operational flexibility.*" 48 Fed. Reg. 23106 (1983) (emphasis added). Consistent with this approach, the second proposed rule provided "that if a State had a system of preplacement preventive and reunification services as required by section 427(a)(2)(C) and (b)(3) of the Act [42 U.S.C. § 627 (a)(2)(C) and (b)(3)], the requirement for 'reasonable efforts' *would be met.*" 48 Fed. Reg. 23106 (emphasis added); see also 47 Fed. Reg. 30935 (1982) (reiterating that Section 671(a)(15) is satisfied by the existence of a plan describing those services).

In response to criticisms that the new proposal was not specific enough and erred in adopting a statewide rather than individualized focus, the Secretary modified the rule in the least restrictive way—by requiring simply that the required case plans be individualized. See 48 Fed. Reg. 23106-07. As the Secretary explained:

> The Department believes that it is an inappropriate and unnecessary Federal intrusion to dictate nationally a specific set of services which may or may not address a particular State's situation. Moreover, the Department believes that it is *essential* to give States the flexibility and responsibility for these service decisions.
>
> However, we agree with commenters that reasonable efforts must be made on behalf of each child. There-

> fore, the Department has provided in 45 C.F.R. 1356.21(b), that *in order to meet the reasonable efforts requirement*, the State agency must identify, in the child's case plan, those services offered and the services provided to the child * * * to prevent placement * * *. *This is not a new or additional requirement. It is similar to the case plan* requirement in 45 C.F.R. 1356.21(d)(4).

48 Fed. Reg. 23107 (emphasis added). The final rule codified this approach, departing from the proposed one only in specifying that the required case plans be individualized. The regulations thus indicate that no more is required by the reasonable efforts language than that the use of individualized case plans be mandated.[11]

3. The statutory and regulatory language thus seems clear enough. But even if it is ambiguous on the question whether Section 671(a)(15) requires more than the promulgation of an appropriate plan (or compliance with the plan adopted by the State and approved by the Secretary), that ambiguity is fatal to respondents' claim. As this Court stated in *Pennhurst*:

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[11] The fact that Section 671(b) authorizes the *Secretary* to withhold funds from States when "in the administration of the plan there is a substantial failure to comply with the provisions of the plan" is not to the contrary. At most the provision requires States to comply with their plans; it does not permit the Secretary—let alone a federal judge—to demand measures beyond those contained in the plan. Here, of course, the three-day rule imposed by the courts below far exceeds the requirements of the State plan. Moreover, in delegating responsibility to the Secretary to enforce Section 671(a), Congress necessarily delegated to the Secretary the authority to interpret the statute, and the Secretary's duly exercised discretion ought to be accorded great deference. *Chevron U.S.A., Inc.* v. *Nat'l Resources Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). Here, the Secretary has determined that Section 671(a)(15) requires only the adoption of individualized plans. And the fact that some of Section 671(a)'s sixteen provisions may require more than the adoption of a plan does not undermine the Secretary's determination that the "reasonable efforts" requirement is not one of them.

> The legitimacy of Congress' power to legislate under the spending power * * * rests on whether the State voluntarily and knowingly accepts the terms of the "contract." * * * Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

451 U.S. at 17 (citations omitted). Because the plain meaning of Section 671(a)(15) requires only that case plans be adopted, and because the administrative regulations more than confirm that reading, the Act hardly can be said to tell the States unambiguously that their participation in the AAA program opens them to substantive demands that are actionable in federal court.

B. Section 671(a)(15)'s Reasonable Efforts Requirement Is Too Vague And Amorphous To Be Judicially Enforceable Under Section 1983.

The court of appeals simply disregarded the considerations discussed above, any one of which is enough to warrant reversal. But even if its decision to apply the *Golden State* test and its assumption that Section 671(a)(15) obligates States to *exercise* reasonable efforts were correct, the court nevertheless erred in holding that the "reasonable efforts" requirement is not too vague and amorphous as to be judicially enforceable under Section 1983. See Pet. App. 11a-12a.

This Court repeatedly has reaffirmed the principle that a statute will not give rise to an action under Section 1983 if its language is too "vague and amorphous" for the judiciary to enforce. See *Wilder*, 110 S. Ct. at 2517; *Golden State*, 110 S. Ct. at 448; *Wright*, 479 U.S. at 431-432. In this case, the "reasonable efforts" requirement in Section 671(a)(15) falls within that category for two related reasons. First, judicial review of a state

agency's "efforts" to determine whether they are "reasonable" would require a court to second-guess the agency's basic decisions regarding policy and the allocation of resources. And second, unlike the provisions at issue in *Wilder* and *Wright*, Section 671(a)(15) and its corresponding regulations fail to provide specific guidelines with which to judge whether reasonable efforts have in fact been made.

1. A judicial determination of the reasonableness of a State's efforts inevitably would involve a review of state policy decisions. And because the reasonableness of the actions undertaken by an agency with regard to any one child can be assessed only in light of its spending on other children, review under the "reasonable efforts" provision necessarily would call into question the agency's allocation of resources. That sort of review strains the bounds of judicial competence. As this Court held in a closely analogous context, in determining whether there was sufficiently specific "law to apply" to warrant judicial review of a federal agency's enforcement actions under the Administrative Procedure Act:

> This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce * * * is a decision generally committed to an agency's absolute discretion. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.
>
> The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, * * * and indeed, whether the agency has enough resources to undertake the action at all. * * * The agency is far better

> equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Heckler v. *Chaney*, 470 U.S. 821, 831-32 (1985) (citations omitted). As the Court therefore concluded, when reviewing an agency's allocation of finite resources there is "no law to apply." *Id.* at 830-31.

It would be incongruous, to say the least, to hold that for purposes of precluding review of enforcement decisions under the Administrative Procedure Act there is "no law to apply," while within the context of a Section 1983 challenge to a state agency's enforcement actions the law is not too "vague and amorphous" to preclude review. Indeed, given the federalism concerns that arise whenever the federal judiciary enjoins state action, federal courts should be less willing to assume oversight of state agencies than of federal ones (or to presume that Congress wished them to do so). Cf. *Board of Education* v. *Dowell*, 111 S. Ct. 630 (1991); *Gregory* v. *Ashcroft*, *supra*.

Here, it is plain that judicial review of a state agency's program to determine whether it satisfies the reasonable efforts provision would require judges to question the policy judgments that enter into the proper allocation of finite resources. As in *Chaney*, agencies implementing the AAA must decide whether resources are best spent on assigning caseworkers to children immediately—a decision that would maximize the number of children assigned to caseworkers, but at the cost of burdening each caseworker with more cases than he or she can effectively handle—or whether in enforcing the Act's provisions agency resources are best utilized by an assignment system that limits the number of children handled by each caseworker. Given that the state resources available to combat the growing societal problem of neglected children represent a zero-sum pie, the resources spent on assigning caseworkers within three days (the solution mandated by the courts below) necessarily must come at the expense

of other vital programs, such as the DCFS's investigative services, as well as at the price of giving sufficient caseworker attention to those children already under assignment.

The court of appeals' decision requiring that all children be assigned caseworkers within three days, therefore, is based on faulty reasoning. The court stated that no efforts cannot amount to "reasonable efforts," and that without assigning a child to a caseworker the agency cannot be making reasonable efforts on behalf of *that child*. Pet. App. 11a-12a. But even assuming that, in the absence of a caseworker, *no* efforts are being made on behalf of the child—a highly disputable assertion—the court of appeals erred by adopting such a narrow focus. Given the number of children in an agency's care, it may well be that providing adequate services to the greatest number of children requires—quite reasonably under the circumstances—that for some period *nothing* be done on behalf of other children. In light of the State's fixed resources, for example, it may well be that, due to a crisis involving one child that requires special attention, an agency might be compelled to leave another child temporarily unassigned for six days. Yet the court of appeals held as a matter of federal law that such a difficult policy decision *never* can be reasonable. Nothing in the statute or its legislative history requires that implausible result.

2. This conclusion is confirmed by comparing Section 671(a)(15) to the provisions at issue in *Wilder* and *Wright*. In *Wilder*, the Boren Amendment specified precisely what duty (a payment) was owed by whom (the State) to whom (hospital providers). The only question left open by the statute was the amount of the required payment. And as to that, the statute provided what the Court termed an "objective benchmark" (110 S. Ct. at 2523): it directed that the rates be adequate "to meet the costs which must be incurred by efficiently and eco-

nomically operated facilities in order to provide care and services in conformity with applicable [safety standards] and to assure that individuals eligible for medical assistance have reasonable access." 42 U.S.C. § 1396a(a)(13)(A). Against this background of statutory specificity, moreover, the relevant regulations set out guidelines to be used in calculating the rates. See 110 S. Ct. at 2522-2523 & n.17. It was these objective guideposts that led the Court to hold the relevant inquiry "well within the competence of the judiciary." *Id.* at 2523.

Similarly, in *Wright* the existence of administrative regulations that "specifically set out guidelines that the [landlords] were to follow in establishing utility allowances" (479 U.S. at 431-32) led the Court to hold that a statute limiting to a "reasonable" amount the utility charge that landlords could include in the rent of low-income tenants was sufficiently specific for purposes of Section 1983. *Id.* Thus, both *Wright* and *Wilder* involved provisions in which the only term left open by the statutes was the amount of payment—a question readily answered by comparison with the objective benchmark of the prevailing market rates.

Here, by contrast, Section 671(a)(15) provides only that States make "reasonable" *efforts* to maintain children in their homes. The statute and its corresponding regulations nowhere state what form those efforts are to take or even who must be the direct recipient of those efforts—the child, the parents, or caseworkers under training. And unlike the case plan and case review requirements of Section 671(a)(16), which the Act specifically defines in great detail in Sections 675(1) and 675(5), the AAA nowhere explains what Congress meant by "reasonable efforts." Indeed, as the administrative history we set out above (at 19-21) makes clear, the reasonable efforts provision is so vague that the Secretary expressly declined even to attempt to specify the precise

duties it imposes. See 48 Fed. Reg. 23106-07; 47 Fed. Reg. 30934-35.

Thus, unlike the provisions at issue in *Wilder* and *Wright*, neither Section 671(a)(15) nor its implementing regulations provide *any* objective criteria with which to measure a State's compliance. Nor do they specify any substantive measures a State must undertake. The only thing clear about Section 671(a)(15) is that it is too vague and amorphous to be judicially enforceable under Section 1983.

3. Finally, the conclusion that Congress did not believe Section 671(a)(15) to create a right that is susceptible to judicial implementation is confirmed by an examination of 42 U.S.C. § 672(a)(1). That provision permits the use of federal funds for foster care maintenance payments in specified circumstances, among them when "the [child's] removal from the home * * * was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and * * * that reasonable efforts of the type described in section 671(a)(15) of this title have been made." Written against the background of state juvenile proceedings, Section 672(a)(1) manifests Congress's intent that state family court determinations as to the exercise of reasonable efforts serve as a prerequisite to the expenditure of federal funds in particular cases. See S. Rep. No. 336, 96th Cong., 2d Sess. 12-16 (1980). Such determinations are made as a matter of course when state authorities separate children from their parents. See Pet. App. 2a. The fiscal purpose of this requirement is clear: Congress sought to ensure that federal funds were not used for foster care payments unnecessarily. See 125 Cong. Rec. 1628-29 (1979) (remarks of Rep. Miller); 125 Cong. Rec. 22686 (1979) (remarks of Sen. Cranston).

Section 672(a)(1) thus indicates that Congress thought it appropriate for specialized state court judges to deter-

mine whether reasonable efforts had been exercised as to particular children. But the contrast between Section 672(a)(1)'s reference to individualized state court judicial determinations and Section 671(a)(15)'s general requirement that state plans include a reasonable efforts provision strongly suggests that the latter provision was not intended to create judicially enforceable rights. In saying this, we do not mean that Section 672(a)(1) precludes recourse to Section 1983 in the usual sense (compare, *e.g.*, *Smith* v. *Robinson*, 468 U.S. 992, 1008-1013 (1984)); instead, the juxtaposition of the provisions, one of which envisions a particular type of judicial determination regarding whether reasonable efforts have been exercised and one of which pointedly does no more than impose a plan requirement, suggests that Section 671(a)(15) does not create rights at all. And while it may or may not be arguable that Section 672(a)(1) creates rights to *individualized* reasonable efforts determinations, that is beside the point here: respondents' class action asserts a generalized right to restructure the state foster care system pursuant to Section 671(a)(15).[12]

The distinction drawn by Congress between individualized and general determinations is a sensible one. The instinct that seems to have motivated the courts below—the feeling that reasonable efforts cannot have been exercised if nothing at all has been done (see Pet. App. 19a)—may have a place when the circumstances of a particular child are before a court. And the use of a judicial determination made in such individualized circumstances as a certification that the child qualifies for federal funds does not threaten federal disruption of the state juvenile system. For the reasons we set out above (at 23-25),

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[12] In fact, there is reason to doubt whether Section 672(a)(1) itself creates rights within the meaning of Section 1983. As we note above, the provision has a fiscal purpose. And the right involved would be one to a state court judicial determination, a peculiar requirement to enforce under Section 1983.

however, it is a different matter altogether to decide whether an entire system, constructed through delicate determinations about the best use of limited resources, provides for the exercise of reasonable efforts. There is no reason to believe that Congress intended federal judges to make such determinations.

CONCLUSION

The judgment of the court of appeals should be reversed.

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In The

Supreme Court of the United States

October Term, 1990

SUE SUTER, et al.,

Petitioners,

v.

ARTIST M., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE STATES OF LOUISIANA, ALABAMA, ARIZONA, CALIFORNIA, COLORADO, DELAWARE, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF THE PETITIONER STATE OF ILLINOIS

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QUESTIONS PRESENTED

1. Whether Section 671(a)(15) of Title IV-E of the Adoption Assistance and Child Welfare Act of 1980 (the "AAA"), 42 U.S.C. Sec. 671(a)(15), which requires that states have a plan to ensure that "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home," is too vague and amorphous to create an individually enforceable right in the complex area of child welfare.

2. Whether children living at home, who are not in foster care, have enforceable rights under Title IV-E of the AAA, which provides reimbursement for "foster care maintenance payments," when the states receive no federal Title IV-E funds to provide services to those children.

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No. 90-1488

In The

Supreme Court of the United States

October Term, 1990

SUE SUTER, et al.,

Petitioners,

v.

ARTIST M., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE STATES OF LOUISIANA, ALABAMA, ARIZONA, CALIFORNIA, COLORADO, DELAWARE, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF THE PETITIONER STATE OF ILLINOIS

INTEREST OF AMICI CURIAE

Amici are states that, like Illinois, accept federal reimbursement for "foster care maintenance payments"

under Title IV-E of the Adoption Assistance and Child Welfare Act of 1980, a federal-state cooperative funding statute.[1] Amici also accept federal funds under numerous other spending-clause statutes.

The Seventh Circuit's decision in *Artist M. v. Johnson*, 917 F.2d 980 (7th Cir. 1990), holds that the AAA's vague "reasonable efforts" clause, 42 U.S.C. Sec. 671(a)(15),[2] creates enforceable rights under 42 U.S.C. § 1983 ("Section 1983") and through an implied private right of action. That holding adversely affects all states that accept Title IV-E reimbursement for foster care costs. The court's novel finding that children both in and out of foster care have an enforceable right to "reasonable efforts" exposes the states to the potential of costly litigation challenging decisions in every child welfare case, whether or not Congress provided Title IV-E funding for that case. Moreover, applied to other imprecise spending clause statutes, the *Artist M.* precedent will lead to a host

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[1] Because this brief is filed on behalf of states by their respective attorneys general, and the District of Columbia by its authorized law officer, its filing does not require consent of respondent or the Court. See Sup. Ct. R. 37.5.

[2] Section 671(a)(15) provides, in pertinent part:

> In order for a State to be eligible for [foster care maintenance] payments under this part, it shall have a plan approved by the Secretary which –
>
> . . .
>
> (15) . . . provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

of other new federally-imposed obligations to persons for whom the states receive little or no federal funds. Many of these statutes, like the one at issue here, are so vague that states could not possibly have known the extent of their specific obligations when they accepted federal funds.

SUMMARY OF ARGUMENT

For more than a decade, the states have been developing and expanding foster care services funded in part through federal reimbursement under Title IV-E of the Adoption Assistance Act. In 1980, Congress enacted the AAA as an amendment to the Social Security Act. The cooperative funding statute was designed to create "fiscal incentives to encourage a more active and systematic monitoring of children in the foster care system." *Vermont Dep't of Social & Rehabilitation Servs. v. United States Dep't of Health & Human Servs.*, 798 F.2d 57, 59 (2d Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987); *see also Spielman v. Hildebrand*, 873 F.2d 1377, 1386 (10th Cir. 1989); *Scrivner v. Andrews*, 816 F.2d 261, 263 (6th Cir. 1987). To create those "incentives," Title IV-E provides reimbursement for foster care costs in exchange for adoption of a state plan meeting certain requirements, including establishment of a case planning process and case review system, both defined in the statute. *See* 42 U.S.C. §§ 671(a)(16), 675(1), (5), (6).

Using the analogy used by this Court in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981), those terms set out the "contract" to which a state is

bound when it accepts federal funds. To those *procedural* mandates defined in the AAA, Congress added the "reasonable efforts" requirement of Section 671(a)(15). Nowhere does the statute define "reasonable efforts," however, recognizing instead that what is "reasonable" depends on the unique circumstances of each individual case and, hence, that such determinations should be left to the states. Thus, Title IV-E carefully balances certain specific procedural requirements with a recognition that child welfare decision making is a difficult process, best committed to specialists at the state level with both expertise and knowledge of the unique circumstances of individual cases.

The Seventh Circuit's opinion in this case upsets the careful balance of federal and state interests enacted by Congress in Title IV-E. Because Congress did not define "reasonable efforts," and because the term is too vague and amorphous to be defined except by state courts with juvenile jurisdiction on a case by case basis, the Seventh Circuit looked to the practices that Illinois had voluntarily implemented to provide reasonable efforts to determine the services to which children in that state were entitled. This approach, if applied in other states, would lead to the incongruous result that children in different states would have different federal rights under the AAA. Such an outcome inevitably subjects states with more extensive welfare programs to more extensive obligations under federal law. By discouraging expansion of state child welfare services, such a result flatly contradicts congressional intent to "encourage" improvements in those systems.

In addition, by allowing each child served by state and local child welfare agencies to sue state officials in federal court every time the child, or some advocate for the child, feels the state's efforts have not been "reasonable," the opinion below will unleash a torrent of litigation challenging the best efforts of state and local child welfare officials and juvenile courts in individual cases. Such litigation will divert states' limited resources to federal litigation instead of services to children. That outcome is directly contrary to the federalism inherent in the AAA, and will deter aggressive and innovative approaches to child abuse and neglect cases.

Under the opinion below, states can no longer ascertain the parameters of their potential liability when they agree to participate in a federal-state cooperative funding program. Indeed, the court below holds that, by accepting federal reimbursement for certain foster care costs, the states also unwittingly accept liability under Section 1983 to children not in foster care, for whom the states receive no Title IV-E reimbursement for direct social services. That holding has implications far beyond the circumstances of *Artist M.* and the AAA. *Artist M.* potentially expands states' obligations under all federal-state funding statutes and creates an unacceptable level of uncertainty surrounding the commitment states make when accepting federal funds. Amici therefore urge this Court to reverse the Seventh Circuit's decision.

ARGUMENT

I.

BECAUSE THE "REASONABLE EFFORTS" CLAUSE IS VAGUE AND UNDEFINED, THE OPINION BELOW CREATES DIFFERENT FEDERAL RIGHTS IN DIFFERENT STATES, DISTORTING STATE CHILD WELFARE DECISIONS AND CREATING A RISK OF INCONSISTENT "RIGHTS"

The opinion below holds that the AAA's vague and amorphous "reasonable efforts" clause creates individually enforceable federal rights directly and through Section 1983. By looking to Illinois' own actions in determining the contours of those rights, the Seventh Circuit's analysis leads to the result that a vague statute may create different federal rights in different states. Because the statutory language is imprecise and undefined, a finding of enforceability exposes state officials to countless lawsuits, both individual and class actions, asserting rights to individual substantive services. Those claims, based on each plaintiff's notion of "reasonableness," will lead to inconsistent judgments and expanded federal intervention into individual state child welfare and adoption decisions, an area of primary state concern.

Nor are these consequences limited to the AAA or the child welfare area. The Seventh Circuit's analysis serves as a precedent for interpretation of other statutes enacted pursuant to the spending power, which will lead to the creation of a host of novel rights without any showing of congressional intent to do so. The Seventh Circuit's opinion is nothing less than abandonment of the "contract" theory of federal funding statutes set out in *Pennhurst* and its progeny. The *Artist M.* court's failure to

replace that theory with any similar framework results in the transformation of federal-state cooperative funding statutes into empty vessels, to be filled after enactment by creating "rights" based on the facts of individual cases.

A. The Opinion Below Conflicts With *Pennhurst* By Holding That Federal Law Creates Different Federally Enforceable Rights In Different States

In *Pennhurst*, 451 U.S. 1, this Court held that cooperative federal-state funding statutes like the AAA are akin to contracts: in return for federal funds, the states agree to comply with specific conditions set forth in the statute. *Id.* at 17, 24-25. Congress must speak *clearly* "so that we can fairly say that the State could make an informed choice." *Id.* at 24-25. *See also Gregory v. Ashcroft*, 59 U.S.L.W. 4714 (U.S. June 20, 1991) (*Pennhurst* applies a "plain statement" rule). An unclear statutory provision, which does not allow the states to determine the precise nature of their obligations, creates no enforceable rights. *Id.*[3]

The opinion below turns *Pennhurst* on its head. Rather than acknowledging that under *Pennhurst* the "reasonable efforts" clause is too unclear and amorphous to create an enforceable right, the Seventh Circuit fails to even mention the *Pennhurst* requirement. Instead, the majority reasons that because Congress left it to the states to devise and implement a plan to provide reasonable

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[3] Like this case, *Pennhurst* involved claims to a wide array of social services, based on a vague statutory provision. *See* 451 U.S. at 24-25 (rejecting claim to "appropriate treatment" in the "least restrictive" setting).

efforts, each state's actions in that regard are determinative of that state's liability under the "reasonable efforts" clause. Following this analysis, the court holds that Illinois' decision "to use caseworkers as the means through which these services are provided" creates an enforceable right to have a caseworker assigned within three days. (App. 11a).[4]

Under the Seventh Circuit's reasoning, because each state uses different means to make reasonable efforts to prevent foster care placement and reunify families, each state is subject to varying federally enforceable rights under the AAA. That outcome is contrary to *Pennhurst*'s holding that a federal funding statute creates enforceable rights only if the states know, *ex ante*, what responsibilities they are assuming. *Pennhurst*, 451 U.S. at 24-25. The notion of rights based on a state's actions after it has accepted federal funds is flatly inconsistent with the requirement that states be able to ascertain their obligations before accepting the "contract."[5]

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[4] "App." citations are to the Appendix to the Petition for a Writ of Certiorari.

[5] This Court's other spending-power decisions are fully consistent with the "contract" theory of *Pennhurst*. Most cases in this area concern monetary entitlements and specifically determinable levels of grant money. States' obligations to provide such easily calculated benefits are clear at the time the states accept federal funds.

Rosado v. Wyman, 397 U.S. 1207 (1970), *Maine v. Thiboutot*, 448 U.S. 1 (1980), and *Miller v. Youakim*, 440 U.S. 125 (1979), all involved benefits payable under the Aid to Families with Dependent Children program. Similarly, *Wilder v. Virginia Hospital Association*, 110 S.Ct. 2510 (1990), addressed methods of

(Continued on following page)

By ignoring Congress' explicit statement that "reasonable efforts" would vary "in each case," the Seventh Circuit has set a precedent which could never be uniformly applied to other states.[6] Child welfare is not and cannot be based on a single practice model in every state. What one state may consider "reasonable efforts" may be unreasonable in another state due to differences in client population and available resources. Even within a single state, there are distinct variances from region to region depending on such factors as whether the region encompasses an urban area or rural communities. In recognition of that fact, many state child welfare systems are administered by a separate agency in each county.

Further, philosophical and practice variations among social workers, social work supervisors, judges, lawyers and other professionals underscore the complexity of child welfare decision making in individual cases. Experts often disagree as to the timing and means for

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determining reasonable Medicaid reimbursement rates paid to health care providers. This Court found an enforceable right to "reasonable and adequate" reimbursement rates only because those rates were tied to an "objective benchmark" in the statute. *Id.* at 2522. The "reasonable efforts" clause contains no such benchmark; instead, Congress acknowledged in the statute that "reasonable efforts" determinations must be made by state officials and juvenile courts "in each case." 42 U.S.C. § 671(a)(15).

[6] Likewise, the Secretary of Health and Human Services has deferred to state determinations of which services are needed in individual cases. *See* 45 C.F.R. § 1357.15(e)(2) (listing a plethora of services the states "*may*" provide).

reunifying a child with a parent who abused or neglected that child. Even at a systemic level, there is no consensus regarding the relative allocation of limited resources to long-term placement and adoption as opposed to preventive and reunification services.[7]

More important, the Seventh Circuit's analysis discourages change and improvement in state child welfare programs. Under the holding below, a state adopting new child welfare programs will face increased obligations under the AAA, since the state presumably will have determined that the more extensive services are "reasonable." Moreover, much progress in this area is accomplished through pilot programs testing new approaches, such as intensive family intervention, with limited populations. If every child in the system may claim a "right" to all such resources, many programs will never see the light of day.

Congress certainly never intended that the very statute it established to encourage improvements in child welfare would serve as a disincentive to states to design and implement new programs. Rather the AAA was intended to create incentives for new programs and approaches to child welfare. A holding that the "reasonable efforts" clause creates enforceable rights undermines that goal and may cause incalculable harm to abused and neglected children and families served by child welfare agencies throughout the country.

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[7] Congress acknowledged that, in some cases, *no* reunification services are appropriate. H.R. Rep. No. 96-136, 96th Cong., 1st Sess. 47 (1979).

B. By Creating a Federally Enforceable Right Where Congress Intended None, The Opinion Below Greatly Expands Federal Court Intervention Into Individual State Child Welfare Decisions, Creating Unsound Child Welfare Policies

In enacting the AAA, Congress recognized the difficulty of individualized decisions in abuse and neglect cases, and recognized that such decisions are best left to the states. *See, e.g.*, H.R. Rep. No. 96-136, 96th Cong., 1st Sess. 47 (1979) ("The decision as to the appropriateness of specific situations will have to be made by the administering agency having immediate responsibility for the care of the child."); S. Rep. No. 336, 96th Cong., 2d Sess. 1, 16, *reprinted in* 1980 U.S. Code Cong. & Admin. News 1448, 1466 (recognizing that states have "primary responsibility" for child welfare); 125 Cong. Rec. 22685 (Aug. 3, 1979) (remarks of Sen. Cranston, the AAA's sponsor) (Congress intended to "leav[e] to the discretion of the States the precise mechanisms for protecting the rights of persons in the foster care system").

The very structure of the statute reflects Congress' intent to defer decision making to the states. In Title IV-E itself, Congress established *state* juvenile courts as the primary check on states' compliance with the "reasonable efforts" requirement. Under Section 672(a)(1) of the AAA, prior to removing a child from the home, the state must obtain a "judicial determination to the effect that continuation therein would be contrary to the welfare of such child *and . . . that reasonable efforts . . . have been made.*" 42 U.S.C. Sec. 672(a)(1) (emphasis added).[8] Section 675(5)(B)

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[8] Section 672(a)(1) makes clear that any right to "reasonable efforts," if it existed at all, would be limited to the

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requires that each case be reviewed in a judicial or administrative proceeding every six months. A state juvenile or family court must hold a dispositional hearing for each child in foster care within 18 months of state custody. *See* 42 U.S.C. § 675(5)(c) (court "shall determine the future status of the child" including return home, adoption, or short-term or long-term foster care). Thus, Congress clearly intended that "reasonable efforts" determinations be made by state juvenile courts, which have extensive experience in the area, a knowledge of available state, local and community resources, and a detailed grasp of individual cases.[9]

The opinion below holds that every child served by a state child welfare agency may sue state officials in federal court when that child, or the child's advocate,

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procedural right to a state juvenile court determination. *Cf.* 45 C.F.R. §§ 1356.21(b), 1357.15(e) (leaving determination of which efforts to provide in each case to the states).

[9] The AAA's unique mechanism to ensure regular judicial review by specialized state courts, in conjunction with the statute's mechanism for federal oversight, evinces a congressional intent to foreclose Section 1983 as a separate remedy. *See Middlesex County Sewerage Auth. v. National Sea Clammers*, 453 U.S. 1, 20 (1981). In many instances, enforcement through Section 1983 furthers congressional goals in enacting a statute. Here, by contrast, Congress intended to leave complex "reasonable efforts" decisions to state juvenile courts, which have a detailed knowledge of individual cases and specialized knowledge from handling such cases regularly. Therefore, this Court should find that Congress intended to bar a federal Section 1983 remedy. *Cf. Smith v. Robinson*, 468 U.S. 992, 1003 (1984); *Carelli v. Howser*, 923 F.2d 1208 (6th Cir. 1991).

believes that the state's efforts have not been "reasonable." See App. 29a (Manion, J., dissenting). By creating enforceable rights from an undefined and vague statutory term, the Seventh Circuit has held that federal judges may give definition to that language, based on the pleas of individual plaintiffs in isolated cases, thereby creating a powerful and unintended vehicle for expansion of federal rights. In the words of the dissent below, the panel opinion opens the door to an "avalanche" of litigation and turns the federal courts into "crisis administrator[s] of child welfare." (App. 29a-30a (Manion, J., dissenting)).

Nor is that "avalanche" merely a wild-eyed prediction: it has already begun. Many states presently face actions raising "reasonable efforts" claims. *See, e.g., Children ABCDEF v. Martinez*, No. 90-2416 (S.D. Fla. filed Oct. 1990); *M.E. v. Martinez*, No. 90-1008 (S.D. Fla. filed May 1990); *Baby Neil v. Casey*, No. 90-2343 (E.D. Pa. filed April 4, 1990); *LaShawn v. Dixon*, No. 89-1754 (D.D.C. filed June 20, 1989); *R.C. v. Hornsby*, No. 88-D-1170-N (M.D. Ala. filed Nov. 1988); *Del. A. v. Edwards*, No. 86-801 (E.D. La. filed Jan. 1986). Many more cases recently have been filed in other states.

In one such action, *Norman v. Johnson*, 739 F. Supp. 1182 (N.D. Ill. 1990), the district court, following the district court opinion in *Artist M.*, held that Illinois' efforts to reunite two individual families were not "reasonable," and entered individualized injunctions. In the case of a third plaintiff, the court found the state's efforts "reasonable," but stated that the court might reconsider that ruling if the state did not provide the plaintiff with sufficient beds. *Id.* at 1208 & n.8 (Report and Recommendation of Magistrate adopted by district court). Nothing

in the AAA evidences Congress' intent to invite such federal judicial micro-management of individual foster-care cases.

Indeed, such federalization of daily child welfare decisions reflects a lack of understanding of the delicate balancing of interests that state officials and juvenile courts must accomplish in each case.[10] The children who come into foster care have been severely abused or neglected, most often by the very parent who seeks the child's return. In making "reasonable efforts" to keep the child at home or to reunify the family, state child welfare specialists, and the juvenile courts that closely supervise their actions, must balance the parental interest in prompt reunification against the safety and welfare of the child. If the state officials err in that calculus, a child may suffer permanent injury. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (child returned home by state juvenile court was beaten so severely by his father that he must spend the remainder of his life in an institution for the profoundly mentally retarded).

There are no pat solutions to the problems that cause child abuse and neglect. "Reasonable" minds may differ as to the timing and means for reunification, and in

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[10] Concerns of federalism and comity underlie many federal decisions construing the AAA. *See, e.g., Spielman v. Hildebrand*, 873 F.2d 1377 (10th Cir. 1989) (no substantive enforceable right conferred by the AAA to a hearing before a state agency); *Winston v. Children and Youth Servs.*, 748 F. Supp. 1128 (E.D. Pa. 1990) (no enforceable right conferred by the AAA to "meaningful visitation"); *Lesher v. Lavrich*, 784 F.2d 193 (6th Cir. 1986) (no private cause of action for damages or for nullification of a state court judgment under the AAA).

judicial hindsight it is all too easy to equate "reasonable efforts" with "successful efforts." This Court acknowledged as much in *DeShaney*, pointing out that, had the state moved more quickly to protect Joshua DeShaney, it "would likely have been met with charges of improperly intruding into the parent-child relationship. . . . " *Id.* at 203.

This case presents the reverse side of the *DeShaney* coin. In *DeShaney*, this Court was concerned that state officials have the freedom to exercise their best judgment on delicate matters of child welfare, without facing federal constitutional claims every time they fail to act quickly in taking custody of a child. Here, plaintiffs ask the Court to create a novel right of action on behalf of those who feel the state has acted *too quickly* in protecting a child. As the dissent below recognized, that result would lead to the same "paralysis" of child welfare agencies that concerned this Court in *DeShaney*. (App. 30a).

Instead of recognizing Congress' intent under the AAA to defer to state courts and state child welfare specialists in individual cases, the opinion below thrusts these complex issues before federal judges, setting them up as "super-juvenile courts." As the dissent predicts:

> Ironically, this decision, while attempting to advance the well-being of abused children, may instead result in the delay or denial of benefits. Delay and denial will result because standing for injunctive and declaratory relief has now been extended to every plaintiff with a notion of "reasonable efforts" that conflicts with that of the DCFS. The DCFS will most likely experience considerable paralysis because any efforts deemed unreasonable by scrutinizing plaintiffs

> and courts could cease, resulting in no remedial efforts while litigation continues in situations where something must be done.

(App. 30a (Manion, J., dissenting)).

Children would be better served by strengthening the existing system of state courts and state administrative reviews than by creating a new layer of federal judicial oversight, which would function in tandem (and often in conflict) with the state court and administrative systems.[11] Rather than allowing a state to determine the appropriate balance of resources, so that it may serve the most children in the most effective and efficient manner possible, federal judges will be forced to decide what allocation of resources is "reasonable" based on the facts of one individual's case. Multiplied by dozens of decisions, each based on a limited view of the landscape, the opinion below will result in a distortion of priorities across the child welfare system.

At present, the states are striving to deal effectively with the growing problem of abused and neglected children. Everyone involved in the child welfare system — including families, state officials, judges, and advocates — agrees on the ultimate goal of protecting children while at the same time reducing unnecessary placements and reunifying families as promptly as is prudent under the

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[11] The state courts are of course subject to review by the Supreme Court to ensure that the state processes comport with the Constitution and federal law. *See, e.g., In re Gault*, 387 U.S. 1 (1967); *In re Winship*, 397 U.S. 358 (1970); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (construing Indian Child Welfare Act).

circumstances of each individual case. By making every difficult decision in every child's case a potential subject of federal litigation, and by inhibiting progressive child welfare policy, the Seventh Circuit's decision in this case sets that struggle back immeasurably. Because of the court's error in this case, and because that error may soon be compounded in other spending-clause cases, amici urge this Court to reverse the decision below.[12]

II.

THE EXTENSION OF ENFORCEABLE RIGHTS TO CHILDREN FOR WHOM THE STATES RECEIVE NO FEDERAL TITLE IV-E FUNDS FOR PROVISION OF SUBSTANTIVE SERVICES REMOVES A CRUCIAL LIMITATION ON FEDERAL COURT POWER TO CREATE ENFORCEABLE RIGHTS

The breadth of the court of appeals' ruling is perhaps best evidenced by the fact that the court found, in a single conclusory paragraph, that children residing in their own homes may sue state officials for preventive services. (App. 18a). In enacting Title IV-E of the AAA, Congress drew a clear line between children in foster care, for

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[12] The court of appeals also found that Section 671(a)(15) authorizes an implied private right of action under *Cort v. Ash*, 422 U.S. 66, 78 (1975). As discussed above, plaintiffs have not met their heavy burden of showing that Congress *intended* to create those rights. In addition, inference of a federal right to "reasonable efforts" is fundamentally inconsistent with the statute's deference to state courts and state agencies and runs contrary to this Court's longstanding recognition that child welfare is primarily an issue of state concern. *See, e.g., Moore v. Sims*, 442 U.S. 415, 435 (1979).

whom the states receive federal reimbursement, and children living at home, for whom the states receive no Title IV-E funds for substantive services. *See* 42 U.S.C. § 672(a) (states receive *"foster care maintenance payments"* in return for complying with conditions in Section 671); 42 U.S.C. § 672(b) ("foster care maintenance payments" made only for children residing in a "foster family home" or "child care institution"); 45 C.F.R. § 1355.20 (foster family home "provides *out-of-home* care for children").[13]

The court below disregarded that powerful evidence in the AAA's structure and extended the novel "reasonable efforts" right to children who reside in their own homes. (App. 18a). Thus, the states now face the possibility of "reasonable efforts" litigation brought by *any* child served by a state child welfare agency. Congress never envisioned that expansion of federal judicial intervention into state child welfare systems.

Moreover, the court of appeals' ruling runs flatly contrary to *Pennhurst*. In *Pennhurst*, this Court refused to find enforceable rights under a statute where Congress provided only a small amount of federal funds: "When Congress does impose affirmative obligations on the States, it usually makes a far more substantial contribution to defray costs." *Pennhurst*, 451 U.S. at 24. Title IV-E of the AAA provides *no* "substantial contribution" to

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[13] Some states obtain Title IV-E reimbursement for a small percentage of "administrative costs" associated with candidates for foster care who have not yet been determined eligible for foster care maintenance payments. *See* 42 U.S.C. § 674(a). Section 674(a) does not provide reimbursement for direct services to families. 45 C.F.R. § 1365.60(c)(3).

serve children in their own homes. Thus, under *Pennhurst*, this Court should find that Congress intended not to create enforceable rights on behalf of those children.

The impact on the states of the Seventh Circuit's holding extends far beyond the sphere of child welfare and the AAA. The AAA is one of many of cooperative federal-state funding statutes. Under the court of appeals' decision, plaintiffs may sue to enforce "rights" under those statutes whether or not Congress intended to create those rights or provided any federal funds to offset a portion of the cost. That result contravenes principles of federalism and fairness, and should be reversed by this Court.

CONCLUSION

For the reasons stated herein and in the Brief for Petitioners, *amici* respectfully urge this Court to reverse the judgment of the Court of Appeals for the Seventh Circuit.

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SUE SUTER, *et al.*,
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ARTIST M., *et al.*,
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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The American Bar Association [hereinafter "ABA"] is a voluntary, national membership organization of the legal profession. Its more than 350,000 members come from every state and territory and the District of Columbia. The constituency of the ABA includes attorneys, judges, law school professors, legislators, and a number of non-lawyer Associates in allied fields. Since its inception over one hundred years ago, the ABA has taken an active interest in the improvement of the administration of justice and the judicial process. In recent years, it has given special attention to the handling of child maltreatment cases by the courts.

The Association, with the written consent of the parties,[1] submits this brief as amicus curiae supporting respondents to call the Court's attention to the impact of this case on the administration of justice in state juvenile and family courts throughout the United States.

The Association's interest in improving the legal and judicial system's handling of cases involving child abuse and neglect has long encompassed the issues presented by this litigation. In August, 1980, the ABA House of Delegates adopted a resolution in support of the federal Adoption Assistance and Child Welfare Act of 1980 (hereinafter "AACWA"), the legislation at issue in this case. In August, 1988, the ABA House of Delegates adopted a resolution supporting a private cause of action to enforce the AACWA.[2]

Since 1978, the ABA Young Lawyers Division has sponsored the ABA Center on Children and the Law. The Center has worked intensively to support the effective implementation of the AACWA. This work has included ongoing technical assistance to a wide range of national, state, and local organizations and professional education throughout the United States. The Center has also conducted scholarly studies of the implementation of the Act and published many articles, monographs, and book chapters on the subject. The following are some of the principal works published by the Center on the AACWA, presented in chronological order. M. Hardin, *Several Perplexing Issues Concerning the Adoption Assistance and*

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[1] Copies of the letters indicating the parties' consent have been filed with the Clerk of the Court.

[2] The resolution calls for an amendment to the AACWA to clarify that there is a private cause of action under the Act. The accompanying report explains that while most courts have held that the AACWA creates a private right of action, until the matter is settled it will continue to complicate litigation. The report also emphasizes the important role that litigation has played in ensuring full implementation of the AACWA and in clarifying its provisions. *Reports of American Bar Association*, 122C (August, 1988), pp. 4, 16-17.

Child Welfare Act of 1980 (1981); M. Hardin, *The Adoption Asisstance and Child Welfare Act of 1980: An Introduction for Juvenile and Family Court Judges* (1983); Allen, Golubock, & Olson, *A Guide to the Adoption Assistance and Child Welfare Act of 1980*, in Foster Children in the Courts 575 (M. Hardin ed. 1983); English, *Litigating Under the Adoption Assistance and Child Welfare Act of 1980*, in Foster Children in the Courts 612 (M. Hardin ed. 1983); D. Dodson, *The Legal Framework for Ending Foster Care Drift: A Guide to Evaluating and Improving State Laws, Regulations and Court Rules* (1983); Hardin & Shalleck, *Children Living Apart From Their Parents*, in Legal Rights of Children § 9.12 (R. Horowitz & H. Davidson eds. 1984); M. Hardin & A. Shalleck, *Court Rules to Achieve Permanency for Foster Children: Sample Rules and Commentary* (1985); Hardin, *Ten Years Later: Implementation of P.L. 96-272 By the Courts*, in The Adoption Assistance and Child Welfare Act of 1980: The First Ten Years 51 (North American Council on Adoptable Children ed. 1990).

In addition to general works on the AACWA, the Center has focused intensively on the "reasonable efforts" requirements of the Act. In 1983, before the reasonable efforts requirement went into effect, the Center distributed a comprehensive memorandum on the requirement, M. Hardin, *The Required Judicial Determination of Reasonable Efforts to Prevent Removal and Reunify the Family* (1983), to the appropriate public child welfare agencies in all 50 states. This memorandum was used as a basis for policy and legislation in many states.

In 1985, the Center followed up by publishing a monograph specifically on reasonable efforts, D. Dodson, *Reasonable Efforts to Prevent Foster Placement: A Guide to Implementing the "Reasonable Efforts" Requirements of Public Law 96-272 Through Judicial Determinations and State Policy* (1985). Also in 1985, the Center received a federal grant to study and provide guidance con-

cerning the reasonable efforts requirements. This culminated in the publication of a project report, a manual for judges, and a general guide to implementation. *See* T. Stein & G. Comstock, *Reasonable Efforts: A Report on Implementation by Child Welfare Agencies in Five States* (1987); D. Ratterman, *Reasonable Efforts: A Manual for Judges* (1987); D. Ratterman, D. Dodson, & M. Hardin, *Reasonable Efforts to Prevent Foster Placement: A Guide to Implementation* (1987).

Since that time, the Center's staff has continued to write, consult, and provide training on the subject throughout the United States. *See* Hardin, The *Judicial Determination of Reasonable Efforts: How and Why*, 6 Protecting Children 7 (1989); Hardin, *Ten Years Later: Implementation of P.L. 96-272 By the Courts*, *supra* p. 3, at 54-55. Recent staff writing also has included state-specific analyses and training materials on reasonable efforts.

SUMMARY OF ARGUMENT

When states fail to make "reasonable efforts," in accordance with 42 U.S.C. § 671(a)(15), the legal system cannot achieve justice for abused and neglected children. Without a private right of action, there is no effective means to compel states to make reasonable efforts.

Meaningful system-wide efforts by public child welfare agencies to work with families is essential to the administration of justice for abused and neglected children. It is only through trying to work with families that agencies can uncover vital facts about the current behavior and condition of parents and about their ability and willingness to improve. If there is no operative state plan ensuring some basic, system-wide efforts to work with families to prevent needless removal of children from their homes and to return them home after removal, then state juvenile and family courts cannot make informed and timely decisions affecting the lives and safety of some

of our nation's most vulnerable children. In the face of inadequate information due to agency failures to work with families, courts are severely handicapped in their ability to decide whether to remove children from their families, whether to return children home, and whether to authorize the adoption of children unable to return home.

Judicial determinations of reasonable efforts, made by state court judges in individual cases pursuant to 42 U.S.C. § 672(a)(1), are no substitute for a private right of action to enforce 42 U.S.C. § 671(a)(15). First, persistent system-wide agency failures to assist families prevent judges from making valid judicial determinations of reasonable efforts in individual cases. Second, fundamental flaws in state statutes and procedures that are condoned by the Federal Government, and severe limitations in judicial resources, prevent juvenile court judges from rigorously reviewing reasonable efforts. Third, even if courts were able to make proper reasonable efforts determinations in individual cases, case-by-case judicial determinations of reasonable efforts are intrinsically inadequate as a remedy for system-wide deficiencies.

Federal enforcement of the AACWA through administrative monitoring does not attempt to address states' systemic failures to make reasonable efforts. The Federal Government requires only that there be present in individual case files agency and court documents which recite that reasonable efforts were made. As a result, states can ensure that they meet federal requirements simply by amending their child welfare agency and court forms.

Accordingly, without a private cause of action to enforce reasonable efforts on a system-wide basis, there is no effective remedy for grave systemic failures to provide reasonable efforts.

ARGUMENT

I. WITHOUT SYSTEM-WIDE REASONABLE EFFORTS BY PUBLIC CHILD WELFARE AGENCIES, STATE JUVENILE COURT JUDGES CANNOT PROPERLY FULFILL THEIR STATUTORY DUTIES TO CHILDREN AND FAMILIES.

The AACWA requires that public child welfare agencies implement a state plan which ensures, for each child who may be placed into foster care, that reasonable efforts will be made to prevent the need for placement and, if placement becomes necessary, to make it possible for the child to return home. 42 U.S.C. § 671(a)(15). Public child welfare agencies, which may be state or locally administered,[3] are agencies legally charged with investigation of child maltreatment and placement of maltreated children into foster care. *See generally* M. Soler, J. Bell, E. Jameson, C. Shauffer, A. Shotton & L. Warboys, *Representing the Child Client* § 4.02 (1989).

Without such reasonable efforts by public child welfare agencies, state juvenile courts[4] cannot fulfill their statutory responsibilities toward abused and neglected children and their families. When agencies fail to make reasonable efforts, they necessarily fail to acquire and provide information about children and families that courts must have in order to decide cases in accordance with the mandates of state and federal law. As a result, judicial decisions are seriously compromised, both in quality and in timeliness.

In child protection cases, juvenile courts are charged with making a series of decisions concerning the child and family. For example, in a single case, a court may need to make the following sequence of decisions: (a) a

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[3] *See* 42 U.S.C. § 672(a)(2).

[4] "Juvenile courts," as used in this brief, refers to state courts having jurisdiction over non-criminal child abuse and neglect cases.

decision whether a child should be removed from home in an emergency; (b) a decision whether to transfer legal custody of a child to an agency; (c) a decision whether to approve a case plan submitted by an agency that is designed to assist the family; (d) a decision whether to authorize the child's return home; and (e) after determining that the child cannot safely be returned home within a reasonable time, a decision whether to terminate parental rights and authorize adoption. *See generally* L. Granik, *Representing Parents in Child Protection Cases: A Basic Guide for Attorneys* (1988); M. Soler, J. Bell, E. Jameson, C. Shauffer, A. Shotton & L. Warboys, *supra*, §§ 4.08-4.15. In arriving at these decisions, the court depends upon the agency for information about how the parents may have maltreated the child, the current behavior and condition of the parents, and the likelihood that the parents' care of the child will improve.[5]

In order to assure that the court receives reliable information concerning the current behavior and condition of the parents and the likelihood that they will improve, agency efforts to assist the family are essential. Critical facts can only be uncovered through work with the family. With few exceptions, the state or local child welfare agency must go through the process of trying to help preserve a family in order to make decisions, formulate plans, and, ultimately, decide how best to achieve a safe and permanent home for the child.[6] Only through

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[5] For a description of types of information that the court needs at different stages of child protection proceedings, see, e.g., M. Hardin & A. Shalleck, *Court Rules to Achieve Permanency for Foster Children: Sample Rules and Commentary* 37-40, 62-65, 81-85, 110-111 (1985). For a thorough overview of juvenile court child protective decision-making issues at the different stages, as seen from the perspective of a child advocate, see D. Duquette, *Advocating for the Child in Protection Proceedings: A Handbook for Lawyers and Court Appointed Special Advocates* 47-110 (1990).

[6] Sometimes, child welfare agencies first come into contact with families in emergencies, where abuse is so severe or parental be-

the agency's efforts to work with the family can the court obtain complete information concerning the current danger to the child, the parents' willingness to work with and cooperate with the agency, the parents' capacity to improve, and the types of help that are available to the family.

Both the state juvenile courts and the advocates practicing before them are heavily dependent upon agencies to develop information concerning the child and family. Throughout the court process, agencies are expected to present specific written information [7] and testimony.

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havior so dangerous that it is necessary to immediately remove the children from home. *See, e.g.*, N.C. Gen. Stat. §§ 7A-577(h), 7A-651(c)(2) (1989); W.Va. Code § 49-6-3(a), (b) (Supp. 1991). Even in such cases, however, agencies generally must work with the family after removal, to try to achieve reunification if that is what the parents want. Only in unusual cases, such as where it is possible to achieve the prompt involuntary termination of parental rights, is the agency excused from trying to work with the family. In these cases, the facts must be strong enough to show that the likelihood of safe reunification is *remote*. An example of such a situation might be a parent with a long-term emotional disorder such as schizophrenia, severe enough to render the particular parent incapable of caring for the child in question. For a discussion of grounds for the termination of parental rights that do not require proof of agency efforts to rehabilitate the family, see Hardin & Shalleck, *Children Living Apart From Their Parents*, in Legal Rights of Children §§ 9.19-9.20 (R. Horowitz & H. Davidson eds. 1984); Mlyniec, *Prosecuting a Termination of Parental Rights Case*, in Foster Children in the Courts 202-209 (M. Hardin ed. 1983).

[7] Typical points at which agencies are required to submit the court reports or other written information include: (a) prior to an emergency hearing following the *ex parte* removal of a child; (b) prior to the disposition hearing where, after determining that a child has been abused or neglected, the court decides whether to transfer legal custody to the agency and to authorize foster placement; (c) upon the completion of a case plan within a specific deadline; (d) prior to a periodic review hearing where the court monitors case progress or makes a decision concerning the permanent placement of the child; and (e) prior to a proceeding concerning the termination of parental rights in anticipation of adoption. *See, e.g.*, Va. Code Ann § 16.1-252(B) (Supp. 1991) (emergency removal);

Without agency reasonable efforts, the information available to and presented by the agency is necessarily incomplete, thus also handicapping children's and parents' advocates in their ability to present relevant testimony and arguments to the court.

When agency failures to make reasonable efforts are *system-wide*, *i.e.*, when agency failures go well beyond the errors of caseworkers or supervisors in individual cases, the effect on judicial decision-making is particularly corrosive. While courts can take action to pressure or compel agencies to correct the failures of individual caseworkers or supervisors—thus providing the court with critical information before the case drags on too long—courts cannot, on a case-by-case basis, compel agencies to correct system-wide failures to provide reasonable efforts. Moreover, in the face of chronic system-wide failures, courts cannot reasonably predict how the agency is likely to deal with the family should the court make a particular decision in the case.

For example, when agencies fail to identify and provide services to families on a timely and dependable basis, courts cannot properly evaluate individual agency case plans, cannot conduct effective periodic case reviews, and will find it difficult to make critical case decisions. Among the key judicial decisions affected are the decisions whether to: (a) authorize the removal of a child; (b) order family reunification; and (c) terminate parental rights.

Ky. Rev. Stat. Ann. § 610.100 (Baldwin 1987) (disposition); Ohio Rev. Code Ann. § 2151.412(A), (C) (Anderson 1990) (case plan); Ind. Code Ann. § 31-6-4-19(b) (West Supp. 1990) (periodic review); Conn. Gen. Stat. Ann. § 45a-717(e)(1) (West Supp. 1991) (termination of parental rights).

A. In the Face of Serious, Large-Scale Agency Failures to Make Reasonable Efforts, Courts Cannot Properly Decide Whether to Authorize the Removal of Children From Their Homes.

State law instructs courts not to order the removal of children when there are safe and appropriate alternatives to removal.[8] But if an agency *routinely fails* to make reasonable efforts to prevent removal after determining that children are in danger, state courts will find it impossible to make informed decisions concerning whether safe alternatives to removal exist.

Failure to make reasonable efforts, on a system-wide basis, to prevent the need for foster placement can affect subsequent judicial placement decisions in two ways. First, because of the agency's inveterate failures to make efforts to work with families, courts are less able to assess the seriousness of the abuse or neglect, the cooperativeness of parents, and the parents' ability to safely care for their children. Because the failures are system-wide, courts trying individual cases have no way to correct them.

Second, because of the agency's failure to be consistent or predictable in its help to families, courts cannot depend upon the agency prospectively to provide safeguards to protect children in their homes (*e.g.*, arranging for home visitors to monitor children's safety). This prevents courts from determining whether the agency will take

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[8] *See, e.g.*, Cal. Welf. & Inst. Code § 361(b)(1) (Deering Supp. 1991) (no child shall be removed from home unless there is substantial danger to the child's health and there are no reasonable means that the child's health can be protected without removing the child); Fla. Stat. Ann. § 39.402(7), (8a) (West Supp. 1991) (no child shall be removed from home if with appropriate and available services the child could remain safely at home); Minn. Stat. Ann. § 260.011 (Subd.2)(a) (West Supp. 1991) (the purpose of the juvenile laws is to preserve and strengthen the child's family ties, removing a child from parents only when child cannot be adequately safeguarded without removal).

sufficient steps to protect any particular child if the child is allowed to remain at home.

When agencies fail to make timely and active efforts to assist families and to accurately project the kinds of help that they will provide, they place courts in a serious dilemma. Courts may choose to authorize the removal of children, knowing that it may be unnecessary, or they may leave children in situations that might be dangerous. Either type of decision has potentially tragic consequences for children and can subject the court to public criticism.

For example, a common type of child neglect occurs when small children are not supervised and left in situations dangerous to their life or health (*e.g.*, unattended at home, allowed to wander into the street, unclothed outside in winter, and exposed to poisons). *See generally* D. Besharov, *Recognizing Child Abuse* 108-112 (1990); Davidson & Horowitz, *Protection of Children From Family Maltreatment*, in Legal Rights of Children § 7.04 (R. Horowitz & H. Davidson eds. 1984). These situations can have a variety of causes: parental drug use, parents in temporary emotional crises, parental misjudgment in trusting someone else to care for their children, parental mental illness, parental character disorders, parental mental incapacity, and a range of other possibilities. Agencies and courts need to know the causes of parents' failures to supervise in order to determine whether children must be removed from home. They need to know the causes of each episode of maltreatment to determine whether parents are likely to allow the situation to recur and to determine whether there are possible ways to safeguard children without removal.

If, after discovering that children are dangerously unsupervised, an agency often fails to make caseworkers available to visit or to assist parents for several days, and if that agency then routinely seeks court authority to place the children outside the home, the court is in a

difficult position. The court has no factual basis to make informed placement decisions in many cases, yet it may feel compelled to approve requests for removal out of caution for children's safety. The following example is illustrative:

> In a situation involving parental non-supervision, the agency might discover that the parent is going through an apparently temporary emotional crisis due to a recent marital separation, and that she suffers temporary lapses in her attentiveness to her children. In addition, the agency might easily locate a relative who is available to help watch the children until the situation subsides. Finally, the agency might arange for day care during the times that the relative would not be in the home.

Federal law and state statutes state a preference for such solutions, so that children can be safeguarded in their own homes.[9] Yet, such solutions are impossible if the court cannot depend upon and cannot compel the prompt assignment of caseworkers during critical periods of the case. Such solutions are impossible if the court has no way of knowing which services are available and, even if available, whether they will actually be provided

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[9] Implicit in the federal requirement of reasonable efforts to prevent placement is a preference to maintain children in their own homes when they can remain there safely. As stated by the leading U.S. Senate sponsor of the AACWA:

> In the past, foster care has often been the first option selected when a family is in trouble: the new [reasonable efforts] provisions will require States to examine alternatives and provide, wherever feasible, home-based services that will help keep families together, or help reunite families.

126 Cong. Rec. S6942 (daily ed. June 13, 1980) (statement of Sen. Cranston). Also reflecting the preference to maintain children in their own homes is the related requirement that public child welfare agencies implement a preplacement preventive service program designed to help children remain with their families. 42 U.S.C. § 627(b)(3). Many states have equally clear statutory preferences. *See supra* note 8.

to the family. To summarize: in the face of system-wide failures to provide reasonable efforts, courts are forced to authorize needless removal of children from their homes or to leave children in situations of potential danger.

B. When Agencies Systematically Fail to Make Reasonable Efforts, Courts Cannot Properly Decide Whether to Authorize the Return of Children to Their Homes.

If a child welfare agency routinely fails to make reasonable efforts to reunify children with their families, courts are powerless, in individual cases, to make informed and timely decisions concerning whether children should be allowed to return home. Agencies must work with families before they can evaluate the feasibility of reunification, and courts need to know the results of such work before they can make an informed decision on reunification.

The AACWA and many state laws call for timely judicial decisions concerning the return of children to their families.[10] These provisions implement one of the

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[10] The AACWA requires a hearing, within 18 months of the time of placement, to determine the future legal status of the child. 42 U.S.C. § 675(5)(C), *explained in* Allen, Golubock, & Olson, *supra* p. 3, at 582-584. *See also* D. Dodson, 3 Comparative Study of State Case Review Systems Phase II: Dispositional Hearings, Chapter 2 (Westat/ABA 1984). Many state laws and procedures establish shorter and more strictly applied time limits for judicial decisions concerning the permanent placement of children. *See, e.g.*, Mich. Comp. Laws Ann. § 712A.19a (West Supp. 1991). *See also* Cal. Welf. & Inst. Code §§ 364-366.26 (Deering Supp. 1991), *explained in* California Continuing Education of the Bar, 2 *California Juvenile Court Practice* §§ 21.4, 21.4A (1981 & 1990 Supp.); Ohio Rev. Code Ann. § 2151.415 (Anderson 1990), *explained in* L. Granik, C. Cunningham, D. Colley & M. Hardin, *Ohio Child Welfare Legal Manual* § 5.4 (1990); Haw. Rev. Stat. §§ 587-72, -73 (1988), *explained in* Child and Parent Advocates Section, Hawaii State Bar Association, *Attorney's Manual For Handling Child Abuse and Neglect Cases In Hawaii* 3-37 to 3-42 (F. Kimura ed. 1989).

basic purposes of the AACWA: to prevent needlessly prolonged foster placements.[11]

When recurrent problems in agency staffing or service planning make it impossible to provide services according to timetables specified in agency case plans, judicial decision-making becomes paralyzed. That is, where services to families are delayed for prolonged periods of time, either because agencies fail to provide timely services, or because cases are left uncovered so that there is no one available to arrange services, courts have no basis upon which to decide whether it is safe to return the child home.

Such circumstances force juvenile court judges to choose between leaving children in needlessly prolonged foster care, prematurely terminating reunification efforts by authorizing new permanent homes, or returning children to conditions where their safety is in question. The following example illustrates the point:

> An agency placed an infant into emergency foster care who was severely underweight due to malnutrition. The mother is young and does not understand the rudiments of child nutrition. Only after teaching the parent how to select and prepare food for the infant might it be safe to return the child.

If the agency has been working with the mother and the mother is cooperative, *if* the court is informed of an available nutritional program, and *if* the program can monitor the baby and ensure its safety, then the court might find it safe to authorize the child's return home. Arguments before the court could focus on the nature of the immediate danger to the child and the ability of the program to ensure the child's safety.

But *if*, on the other hand, the agency in question is slow and haphazard in its assignment of caseworkers and

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[11] *See, e.g.*, S. Rep. No. 336, 96th Cong., 2nd Sess. 10-12 (1979), *reprinted in* 1980 U.S. Code Cong. & Admin. News, 1459-1461.

delivers services in a chaotic and unpredictable manner, such results are highly unlikely. Because of these agency failures, the mother's problem will be identified after the infant has been away from home a needlessly long time (or may never be identified), and the agency will not know in advance if or when the instructional program will be available to the parent. Legal advocacy and judicial decision-making concerning family reunification will be handicapped. The court will not be able to meet its statutory obligation to reach a timely reunification decision.

C. Confronted With Agency-Wide Failures to Make Reasonable Efforts, Courts Cannot Make Timely Decisions to Free Children for Adoption.

When agencies fail to make reasonable efforts to prevent placement and to reunify families, courts also are unable to make informed decisions whether to terminate parental rights and legally free children for adoption. This condemns children to remain in needlessly prolonged unplanned foster placements, contrary to the purposes of the AACWA.

After children have remained in foster care for extended periods of time, decisions are needed concerning whether they should be returned home or placed in alternative permanent homes, such as through an adoption. When children cannot be returned home and parents refuse to consent to adoption, termination of parental rights proceedings sometimes are necessary.

In most cases, for courts to order the involuntary termination of parental rights there must be proof that agencies have actively, but unsuccessfully, worked toward achieving family reunification.[12] While there are

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[12] *See, e.g.*, Ala. Code § 26-18-7(a)(6) (1986) (in determining whether grounds for termination of parental rights exist, the court shall consider whether the agency's reasonable efforts have failed); La. Rev. Stat. Ann. § 13:1601(D)(4), (F)(4) (West 1983) (to

cases that are so extreme that it is possible to terminate parental rights without attempting to work with particular families—*e.g.*, due to egregious maltreatment or demonstrably hopeless parental incapacity—these cases are uncommon. *See* Mlyniec, *Prosecuting a Termination of Parental Rights Case*, in Foster Children in the Courts 193, 207 (M. Hardin ed. 1983).

Therefore, when services are repeatedly delayed and when there are prolonged periods where there is no caseworker available to arrange services, there often is no legal basis for a termination of parental rights—even for children who, in fact, will never return home. In such situations, courts have no choice but to permit children to remain indefinitely in impermanent foster placements and to keep parents in indefinite suspense concerning the fate of their families.

In fact, in a recent report of the Inspector General of the U.S. Department of Health and Human Services, administrative barriers in the child welfare delivery system were found to be the most significant source of delays in freeing children for adoption. In particular, the report emphasized that "states are not timely or effective in meeting 'reasonable efforts to reunite families' requirements which are prerequisites to permanent placement." In a survey conducted for the report, over 75% of the respondents indicated that the failure of state agencies to meet the "reasonable efforts" standard to the satisfaction of the courts is *the primary barrier* to implementing permanent plans of adoption for children in foster care who are unable to return home. U.S. Department of Health and Human Services, Office of Inspector General, *Barriers to Freeing Children for Adoption*, 11-13 (1990).

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establish certain statutory grounds for termination of parental rights, the department must show reasonable efforts); R.I. Gen. Laws § 15-7-7(1)(c), (2)(a) (1988) (to establish certain statutory grounds for termination of parental rights, the agency must show reasonable efforts).

II. JUDICIAL DETERMINATIONS OF REASONABLE EFFORTS, MADE BY STATE JUVENILE COURTS IN INDIVIDUAL CASES PURSUANT TO 42 U.S.C. § 672(a)(1), ARE *NOT* A SUFFICIENT MEANS OF ENFORCING THE REASONABLE EFFORTS REQUIREMENT.

There are two reasonable efforts requirements of the Adoption Assistance and Child Welfare Act of 1980. The first, the enforceability of which is at issue in this litigation, is that state child welfare agencies must have a plan which provides that "in each case, reasonable efforts shall be made (A) prior to the placement of a child, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home." 42 U.S.C. § 671(a)(15).

Second, there must be a *judicial determination* (finding), by the court authorizing removal of a child, to the effect that such reasonable efforts have been made. This determination is required for a child to be eligible for federal foster care matching funds under Title IV-E of the Social Security Act. The child will be eligible only if:

> [T]he removal from the home occurred pursuant to a voluntary placement agreement entered into by the child's parent or legal guardian, or was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and (effective October 1, 1983) that reasonable efforts of the type described in [42 U.S.C. § 671(a)(15)] have been made. 42 U.S.C. § 672(a)(1).

To paraphrase, in order for a child entering foster care as the result of court proceedings to be eligible for federal foster care matching funds, there must be a judicial finding that the agency has made the reasonable efforts described in 42 U.S.C. § 671(a)(15).

This judicial determination requirement is not sufficient, in itself, systematically to enforce agency obligations to provide reasonable efforts pursuant to 42 U.S.C.

§ 671(a)(15). This is true because: (a) large-scale agency failures to provide reasonable efforts undermine the value of case-by-case judicial determinations of reasonable efforts; (b) many state and local jurisdictions ineffectively implement case-by-case judicial determination of reasonable efforts; and (c) case-by-case judicial determinations of reasonable efforts cannot effectively remedy systemic problems.

A. Large-Scale Agency Failures to Make Reasonable Efforts Undermine the Value of Judicial Determinations of Reasonable Efforts in Individual Cases.

Just as large-scale agency failures to make reasonable efforts make it difficult for judges to make removal, reunification, and termination of parental rights decisions, such failures make it extremely difficult for judges effectively to fulfill their responsibilities under 42 U.S.C. § 672(a)(1). When faced with grave system-wide problems, juvenile court judges making reasonable efforts determinations face a dilemma. They must choose between accepting system deficiencies (and thus making an affirmative—but false—reasonable efforts determination) or routinely causing the cutting off of federal foster care funds for the placement of children within the jurisdiction—thus depriving the children of needed assistance. If problems are agency-wide and the judge is unwilling to act so that funds are cut off, the reasonable efforts sanction becomes meaningless.

By contrast, where the agency has an organized, consistent approach in providing services to families, the judicial determination can effectively address individual or local deficiencies. The court can focus on such issues as whether the individual case plan is logically related to family problems and whether the caseworker has diligently implemented that plan. The court can help ensure that appropriate services are uncovered or arranged. *See* M. Hardin, *The Judicial Determination of Reason-*

able Efforts: How and Why, 6 Protecting Children 7 (1989).

In a system where deficiencies are isolated and fairly infrequent occurrences, the court can utilize negative reasonable efforts findings as a fiscal sanction to compel the agency to act. If the agency has the capacity to correct a deficiency, the judge need not fear that a negative determination is having a harmful effect on children. Once the agency remedies the problem, the judge can then make a positive determination, allowing the matching funds to begin.[13]

B. In Many Jurisdictions, State and Local Laws, Procedures, and Resource Limitations Make the Judicial Determination of Reasonable Efforts Ineffective.

In many states, the judicial determination is structured in such a way that it can not effectively cause the public child welfare agency to improve services, even in individual cases. That is, state laws, procedures, and forms are structured in a way that precludes effective fiscal sanctions against the agency for failure to provide reasonable efforts.

While 42 U.S.C. § 671(a)(15) requires that every state plan ensure ongoing and continuous reasonable efforts—first to prevent removal and then to reunify the family—the judicial determination generally only addresses reasonable efforts at the very early stages of a case. Because 42 U.S.C. § 672(a)(1) does not explicitly require repeated reasonable efforts determinations, and because federal policy requires only one determination as a condition for state collection of matching funds,[14] most states make

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[13] A federal policy announcement states that if there is a positive judicial determination of reasonable efforts following a negative one, eligibility for federal foster care matching funds can begin after the positive determination. U.S. Department of Health & Human Services, Policy Announcement ACYF-PA-84-1 (1984).

[14] *See supra* note 13.

the determination *only* at emergency hearings and/or at the first hearing transferring custody of the child to the agency.[15] Thus, in most states, the case-by-case judicial

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[15] *See* Ark. Stat. Ann. § 9-27-328 (1991); Fla. Stat. Ann. §§ 39.402 (8)(a), 39.408(6), 39.41(4), 39.442(4), 39.464(5) (West 1988 & Supp. 1991); Ga. Code Ann. § 15-11-41(b) (1990); Idaho Code §§ 16-1605(b)(6), 16-1610(b)(2), 16-1614(e)(2), (4) (Supp. 1990); Ill. Ann. Stat. ch. 37, para. 802-10(2), para. 803-12(2) (Smith-Hurd 1990); Iowa Code Ann. §§ 232.52(6), 232.95(2)(a), 232.102(5)(b), (7) (West 1985 & Supp. 1991); Kan. Stat. Ann. §§ 38.1542(f), -1543(i), -1563(h) (Supp. 1990); Ky. Rev. Stat. Ann. § 200.595(1), (2) (Michie/Bobbs-Merrill 1991); Ky. Rev. Stat. Ann. § 610.140 (1)(c) (Baldwin 1989); La. Code Juv. Proc. Ann. art. 87(F) (West Supp. 1990); Me. Rev. Stat. Ann. tit. 15, §§ 3312(3)(B)(5), 3314 (1)(C-1) (Supp. 1990); Mich. Comp. Laws Ann. § 712A.18f(1), (4) (West Supp. 1991); Minn. Stat. Ann. §§ 260.011(Subd.2)(b)(1), 260.012(a), (b), (c), 260.155(Subd.7)(7), 260.172(Subd.1)(c), 260.191(Subd.1a)(d) (West Supp. 1991); Miss. Code Ann. §§ 43-21-301(4)(c), -309(4)(c)(i), -405(6), -603(7) (Law. Co-op. Supp. 1990); Mo. Ann. Stat. § 211.183 (Vernon Supp. 1991); Mont. Code Ann. § 41-5-523(1)(b)(i) (1989); Neb. Rev. Stat. §§ 43-246(4), -254, -284 (1988 & Supp. 1990); Nev. Rev. Stat. Ann. §§ 432B.394, 432B.550(1) (Michie Supp. 1989); N.J. Stat. Ann. § 30:4C-54 (West Supp. 1991); N.M. Stat. Ann. § 32-1-34(A)(9) (Supp. 1989); N.Y. Fam. Ct. Act §§ 352.2(b), 754(2), 1022(a), 1027(b), 1028, 1052(b) (Consol. Supp. 1990); N.Y. Soc. Serv. Law § 358-a(1), (2), (3) (Consol. Supp. 1990), N.C. Gen. Stat. §§ 7A-577(h), 7A-651(c)(2), (1989); Ohio Rev. Code Ann. § 2151.419 (Anderson 1990); Okla. Stat. Ann. tit. 10, § 1104.1(C)(1) (West Supp. 1991); 42 Pa. Cons. Stat. Ann. §§ 6332(a), 6351(b) (Purdon Supp. 1991); Tex. Fam. Code Ann. § 54.04(i)(2) (Vernon Supp. 1991); Wyo. Stat. Ann. § 14-6-229(a) (Supp. 1991). *But see* Ala. Code § 26-18-7(a)(6) (1986); Cal. Welf. & Inst. Code §§ 319(d), 361(c), 366.21(f) (Deering Supp. 1991); Ind. Code Ann. §§ 31-6-4-6(e), 31-6-4-6.6(c)(5), (6), 31-6-4-19(b), 31-6-11-10(b) (West Supp. 1990); Or. Rev. Stat. § 419.577 (3)(b), 419.784(2)(a) (Supp. 1990); S.D. Codified Laws Ann. §§ 26-8A-21, -22, -25 (Supp. 1991); Va. Code Ann. §§ 16.1-251(A)(2), -252(A), (E)(2), -282(D) (Supp. 1991); Wash. Rev. Code Ann. §§ 13.32.A170(1)(d), 13.32A.190(2), 13.34.060(8)(a), 13.34.130(1)(b), 13.70.100(5)(b) (Supp. 1991); W.Va. Code §§ 49-2-16, 49-5-13 (4)-(7), 49-6-3(a), (b), 49-6-5(a)(5), (6), 49-6-8(a) (Supp. 1991); Wis. Stat. Ann. §§ 48.355(2)(b)(6), (2c), 48.365(2m)(a), 48.38(5)(c)(7), (6)(c) (West Supp. 1990).

determination is totally ineffective as a means of enforcing reasonable efforts in the later stages of a case.

In many jurisdictions, courts use pre-printed form court orders setting forth affirmative findings that the agency has made reasonable efforts. These forms leave no blank space for recording a negative determination, nor do they prompt a description of what were the agency's efforts to assist the family. As a result, court orders automatically indicate that the judge has made an affirmative finding of reasonable efforts, when in fact the issue is typically never raised in the hearing. *See* Hardin, *Ten Years Later: Implementation of P.L. 96-272 By the Courts*, *supra* p. 3, at 54-55; *See also* Select Committee on Children, Youth, and Families, U.S. House of Representatives, *No Place to Call Home: Discarded Children in America* 55, 101st Cong., 2d Sess. (1990).

Many juvenile courts throughout the United States are unable to take time to focus on the judicial determination of reasonable efforts, because they themselves are facing a severe crisis in managing their caseloads. Faced with: (a) increasingly difficult and complex types of cases (e.g., drug-exposed infants); (b) a vastly more elaborate court process due to recent requirements of state and federal law; and (c) staggering recent increases in the size of their dockets, juvenile court hearings are necessarily truncated and often set over or continued.[16]

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[16] For further discussion of the escalating burdens placed upon juvenile courts throughout the United States, see Hardin, *Ten Years Later: Implementation of P.L. 96-272 By the Courts*, *supra* p. 3, at 58-63, and authorities cited therein. *See also* U.S. Department of Health & Human Services, U.S. Advisory Board on Child Abuse and Neglect, *Child Abuse and Neglect: Critical First Steps in Response to a National Emergency* 87 (1990). The situation in many areas, particularly in large urban courts, has reached truly crisis proportions. *See, e.g.*, New York State Bar Association, *Joint Hearings on the Caseload Crisis in Family Court, 1990* (1990) (New York City); N. Benoit & T. Izzo, *Our Children, Our Responsibility* 59-69 (1991) (Rhode Island); C. Glynn, *Precious Time: Working with Courts to Get Children Safely Home* (1988) (Miami).

Finally, a number of state statutes actually prohibit the removal of a child from the home *unless* the court makes an affirmative finding that the agency has made reasonable efforts to prevent placement. Fla. Stat. Ann. §§ 39.402(8)(a), 39.422(5) (West 1988); Idaho Code §§ 16-1605(b)(6), 16-1614(e)(2), (4) (Supp. 1990); Iowa Code Ann. §§ 232.52(6), 232.95(2)(a), 232.102(5)(b) (West 1985 & Supp. 1991); Kan. Stat. Ann. §§ 38-1542(f), 38-1543(i), 38-1563(h) (Supp. 1990); Ky. Rev. Stat. Ann. § 620.140(1)(c) (Baldwin 1989); Me. Rev. Stat. Ann. tit. 15, §§ 3312(3)(B)(5), 3314(1)(C-1) (Supp. 1990); Miss. Code Ann. §§ 43-21-301(4)(c), -309(4)(c)(i), -405(6), -603(7) (Law, Co-op Supp. 1990); Neb. Rev. Stat. §§ 43-254, -284 (1988 & Supp. 1990)); S.D. Codified Laws Ann. §§ 26-8A-21, -22 (Supp. 1991); Wash. Rev. Code Ann. §§ 13.32A.170(1)(d), 13.34.130(1)(b) (Supp. 1991); Wyo. Stat. Ann. § 14-6-229(a) (Supp. 1991). In such states, a situation cannot arise where the state loses foster care matching funds due to a negative reasonable efforts finding. In such states, the reasonable efforts requirement cannot function as a fiscal sanction for the failure to assist families. The following example explains the dilemma posed by statutes requiring a reasonable efforts finding as a precondition for out-of-home placement of a child:

> After investigating a child abuse report, a state child protection agency unreasonably fails to provide available services to a family. Later, the parents' abusive behavior deteriorates to the point that the child must be immediately removed for his own safety. By literal application of state law, the child cannot be removed because the agency failed to make reasonable efforts to prevent placement. In reality, most judges will, of course, enter the required finding that the agency did make reasonable efforts in order to protect the child, thus rendering the reasonable efforts requirement a practical nullity.

C. Judicial Determinations of Reasonable Efforts, Pursuant to 42 U.S.C. § 672(a)(1), Cannot By Themselves Correct Agencies' Large-Scale Failure to Provide Reasonable Efforts.

Even if state laws and procedures for the reasonable efforts determination were improved, and even if juvenile courts throughout the United States were able to make a proper reasonable efforts inquiry, the case-by-case judicial determination of reasonable efforts still would be intrinsically inadequate as a remedy to correct systemic deficiencies. It is impractical for individual juvenile court judges to correct system-wide problems, particularly those extending beyond their jurisdictions. Large numbers of negative reasonable efforts determinations by different judges are unlikely to follow consistent patterns in addressing systemic deficiencies in reasonable efforts. Agencies are unlikely to obtain clear direction from such determinations in the aggregate. Only through litigation to enforce reasonable efforts on a systemic basis, such as through this § 1983 litigation, can courts provide clear and consistent system-wide enforcement of reasonable efforts.

III. FEDERAL ENFORCEMENT CANNOT ENSURE SUBSTANTIVE COMPLIANCE WITH THE REASONABLE EFFORTS REQUIREMENT.

In the course of enforcing the AACWA, the Federal Government has not attempted actually to determine whether agencies make reasonable efforts to preserve families. First, while the Federal Government monitors whether agencies document steps that they deem to be reasonable efforts, it has never questioned the reasonableness of the efforts described. The Federal Government does monitor whether agency case plans describe agency activities that the agency itself deems to be reasonable efforts, but the Federal Government has never questioned whether the actions described actually constitute reasonable

efforts. *See* 45 C.F.R. §§ 1356.21(b), (d)(4), 1357.15 (e); U.S. Department of Health & Human Services, Policy Announcement ACYF-PA-84-1 (1984).

Second, the Federal Government monitors whether state courts' written findings concerning reasonable efforts have been made in each case in which federal matching funds have been claimed, but the Government has neither questioned whether the efforts were in fact reasonable, nor whether the court actually conducted any deliberations concerning reasonable efforts. In sum, the Federal Government has never qualitatively reviewed or enforced the reasonable efforts requirements. As a result, federal monitoring fails to correct systemic failures such as those at issue in this case.

The ABA does not mean to imply that the Federal Government *should or should not* qualitatively review the reasonableness of agency efforts. The fact is that it does not do so and, this being the case, the judiciary is the only source of substantive enforcement of this important federal law.

IV. THE ONLY EFECTIVE MEANS OF REMEDYING AGENCIES' SYSTEMIC FAILURES TO PROVIDE REASONABLE EFFORTS IS THROUGH A PRIVATE CAUSE OF ACTION.

Because the Federal Government does not substantively monitor reasonable efforts, and because state courts, in making individual reasonable efforts findings, cannot enforce system-wide reasonable efforts, the only effective means of enforcing such efforts is through recognition of a judicial remedy, *i.e.*, through a private cause of action. Such a remedy is important, not only because of the direct impact of the cases that actually are decided, but also because the existence of the remedy is needed to convince states that they must make state-wide reasonable efforts to assist families. In the absence of any other effective means of enforcement, the existence of a private cause of action is critical.

The American Bar Association relies upon the Seventh Circuit decision and respondents' brief to provide legal analysis of why a private right of action exists under the existing standards of the Court.

CONCLUSION

For the reasons stated above, the American Bar Association respectfully urges this Court to affirm the judgment of the court of appeals.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1991

SUE SUSER, *et al.*,

Petitioners,

v.

ARTHUR M., *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF OF THE NATIONAL COUNCIL OF
JUVENILE AND FAMILY COURT JUDGES AS
AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

The National Council of Juvenile and Family Court Judges will address the following issues:

1. Whether the full implementation of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272, 94 Stat. 500, requires the availability of private causes of action under 42 U.S.C. § 1983.

2. Whether the existence of private causes of action in the federal courts will enmesh federal courts in family and child welfare issues in a manner that interferes with the role of state courts under the Adoption Assistance and Child Welfare Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1488

SUE SUTER, *et al.*,

Petitioners,

v.

ARTIST M., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

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BRIEF OF THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

INTEREST OF AMICUS

This brief *amicus curiae* is being filed with the consent of the parties pursuant to Rule 37. Letters of consent are on file with the Clerk. The National Council of Juvenile and Family Court Judges was founded in 1937 and is the oldest national judicial membership organization in the United States. The Council serves as the only national organization constituted of members of state juvenile and family

courts. The Council's current membership encompasses an estimated 2,500 juvenile and family court judges and related juvenile justice professionals.

One of the primary goals of the Council is to offer continuing education for the nation's judiciary. In 1969, the National College of Juvenile and Family Law was established as the Council's training division. Both the Council and the training College are headquartered in the Midby-Byron National Center for Judicial Education on the University of Nevada campus in Reno, Nevada. The research division of the Council is the National Center for Juvenile Justice, located in Pittsburgh, Pennsylvania.

The members of the Council are deeply involved in child welfare issues, both professionally and personally. The implementation of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272, 94 Stat. 500, ("the AACWA") directly affects the interests of the Council and its members, particularly the judicial members who hear and decide child welfare cases under the provisions of state law and the AACWA. The Council and its members have necessarily acquired extensive practical experience and expertise in administering the provisions of the AACWA and offer a unique perspective on the impact of that Act and the consequences of allowing private causes of action to enforce the AACWA. In July, 1989, the Council adopted a resolution that the AACWA "should be amended to clarify that there is a private cause of action under the Act." *National Council of Juvenile and Family Court Judges*, July, 1989 **Resolution ¶ 9.**

Because the issue in this case is one the Council has already addressed and one which directly affects

its members' collective and individual interests, it has a legitimate interest in the decision by this Court. Because the briefs of the Petitioner and *amici* supporting the petitioner rely, in part, on arguments about the impact of private causes of action on state court judges, the Council believes it would be both appropriate and beneficial for this Court to receive and consider the Council's views.

SUMMARY OF ARGUMENT

Based on the extensive experience of the Council and its members in deciding cases affected by the AACWA, the Council believes that full and successful implementation of the congressional policies expressed in the AACWA requires the availability of private causes of action under federal law. In accepting federal funds, the legislative and executive branches of our governments have agreed to attempt to insure that the goals and purposes of the AACWA are carried out. Private causes of action can address issues of allocation of state and local resources to determine whether those systemic actions have been adequate. Individualized judicial decisions on "reasonable efforts" to protect a child's interests are necessarily limited in their ability to reach such general issues of resource allocation.

The Council recognizes and supports the primary role of state court judges in adjudicating individual cases under applicable state law and the AACWA. The Council feels, however, that the role of state judges is not threatened or impaired by the existence of a private cause of action under federal law to remedy systemic problems of inadequate implementation of the AACWA. To the contrary, the Council

believes that the existence of such an alternative to individualized determinations is essential if our courts are to be able fully and faithfully to follow the commands of state and federal law. For that reason the Council supports the recognition of private causes of action under the AACWA, in federal court, to decide claims of systemic failure to follow the commands of federal law. Federal judicial decisions on the adequacy of state actions at the systemic level do not threaten the statutory and traditional role of state courts in making judicial determinations in individual cases.

The Council takes no position on whether the existing AACWA should be judicially interpreted to recognize such actions or legislatively amended to permit such actions. The Council believes the Court will be fully advised by the parties and the other *amici* as to the merits of the precise legal issue before it. The Council's interest in this case is in informing the Court that this organization of state court judges who implement the AACWA on a regular basis does not believe that a federal private cause of action interferes with their jurisdiction, but instead believes that such actions are essential to the proper performance of their judicial duties.

HISTORY OF THE COUNCIL'S ACTIVITY IN PERMANENCY PLANNING

In 1974, the Council first began its efforts to improve judicial review of abused and neglected children. The initial focus was on children already in substitute placements such as foster care homes, or institutional placements. Council members set out to examine the nation's foster care population, find out why children lingered too long in foster care, suffered

through multiple placements, constantly changed social service personnel and were provided inadequate service programs.

The Council called for expanded and increased judicial review of children in placement, and strongly supported allied child welfare organization efforts across the nation to increase "permanency planning" for each dependent child under the jurisdiction of juvenile and family courts. Permanency planning is the term used to characterize efforts to prevent the unnecessary removal of children from their families, or, when safety concerns warrant foster care, to ensure quick family reunification. For children unable to be safely reunited with their families, effective permanency planning serves to identify adoptive placements as quickly as possible.

The Council was a primary source of development and endorsement for the AACWA which was designed to encourage states to re-examine the policies and procedures through which children were removed from their natural families and placed in foster care. Judges nationwide were joined in their focus on permanency planning by social workers, attorneys, state legislators and child advocates who recognized the harmful effects of unnecessary foster care placement and the strong emotional need for permanency in the lives of each abused and neglected child.

The Council enthusiastically endorsed the provisions of the AACWA, and established its Permanency Planning for Children Project in 1980. Funded by both private and government sources, the project was designed to provide training and technical assistance to judges and other professionals engaged in child placement decisions. The project helped to establish Per-

manency Planning Task Forces in most of the 50 states. Each State Task Force was comprised of judges, social service agency personnel, legislators, attorneys, child advocates, citizen volunteers and others engaged in child welfare issues.

ARGUMENT

I. THE AACWA CANNOT BE ADEQUATELY IMPLEMENTED WITHOUT PROVISION OF PRIVATE CAUSES OF ACTION EITHER TO REMEDY SYSTEMIC FAILURES TO ALLOCATE RESOURCES OR TO TAKE APPROPRIATE ADMINISTRATIVE STEPS TO ATTAIN COMPLIANCE

During the early phases of the Council's Permanency Planning Project, it was quickly concluded that increased review and monitoring of abused and neglected children would not be possible without increased community resources. While there have indeed been notable permanency planning achievements in jurisdictions throughout our nation, the successes are overshadowed by the failure of the Act to be fully implemented in many of the 50 states. Although the Act's requirements concerning regular judicial review of abused and neglected children have promulgated new interaction and cooperation between courts and social service agencies, the "reasonable efforts" provision of the Act remains inappropriately and inadequately implemented. This failure to fully implement the Act can be attributed, first, to initial confusion regarding its provisions, and, secondly, to the inadequacy of government's response to the crisis-level increase in the number and complexity of abuse and neglect cases coming to the attention of agencies and state court systems.

Among the substantive reforms contained in the Act was a requirement that states develop written case plans for each child in federally reimbursed and state-supervised foster care. This case plan is required to promote placement of each child in the least restrictive setting, in close proximity to the natural parent's residence, consistent with the best interests and special needs of the child. 42 U.S.C. § 675.(5)(A). Since 1983, the Act has required state judges to determine whether "reasonable efforts" have been made to enable children to remain safely at home and to avoid unnecessary foster care. 42 U.S.C. § 671(a)(15)(A). The Act also requires that reasonable efforts be made to reunite foster children with their biological parents. 42 U.S.C. § 671(a)(15)(B).

The nation's juvenile and family court judiciary must, on a consistent and continuing basis, determine whether "reasonable efforts" were provided by the agency to prevent the necessity for foster care placement of each child; or, in cases in which a substantial risk of harm to the child makes placement unavoidable, to rehabilitate and reunify each child's family. This burden is a heavy one, and it is one which the juvenile and family court judiciary cannot shoulder without assistance.

A. As a Consequence of Multiple Failures of Government, Juvenile and Family Court Judges Remain Unable to Fulfill Judicial Responsibilities Under the Act

The well-intentioned designers of the AACWA intended to rechannel government attention and resources to avoid unnecessary foster care and to preserve families. As noted in a 1984 federal study, the Act "was designed to remove barriers to permanency based in previous federal policy by creating

a system of fiscal incentives and programmatic safeguards that would promote the achievement of three major goals: 1) to prevent unnecessary entry into foster care; 2) to improve the quality, extend the range, and increase the coordination of services to children and their families; and 3) to promote timely reunification of families in which the child's entry into foster care is unavoidable, or assure in other ways, such as adoption, the child's permanent status in a protected family setting." 1 R.T. Yoshikami, *et al., Assessing the Implementation of Federal Policy to Reduce the Use of Foster Care*, Children's Bureau, Administration for Children, Youth and Families, Office of Human Development Services, Dept. of Health and Human Services, 2 (1984).

Despite initial optimism in state-by-state implementation of the law, both state child welfare agencies and juvenile and family court systems encountered difficulty in complying with its provisions. Administrative and judicial response to the Act has not been uniform across states. "The state judicial response to the requirements of [the AACWA] varies dramatically from jurisdiction to jurisdiction. . . . State statutory changes for the most part were consistent not necessarily with the intent of the Act, but with the manner in which the [statutory] audits were focused. For example, . . . the audit questions whether there has been a judicial finding of reasonable efforts. States assumed that one finding of reasonable efforts was sufficient [to obtain federal] dollars, [and thus] passed statutes or promulgated regulations requiring a judicial finding of reasonable efforts prior to a child's removal or commitment." *Innovative Child Welfare Services Programs Designed to Preserve Families:*

Hearings Before the Subcomm. on Human Resources of The House Comm. on Ways and Means, 102nd Cong., 1st Sess. 64 (1991) (statement of R.J. Fitz-Gerald, Family Court Judge, Jefferson District Court, Louisville, Kentucky) (*hearings have been submitted to GPO for printing*).

B. There Are Continuing and Increasing Barriers to Progress In Achieving Full and Faithful Compliance with the Congressional Mandates

Several states have made rapid and successful systemic improvements toward compliance with the Act. Yet the nation's social service and child welfare sectors remain, for the most part, unable to effectively implement the Act due to overburdened personnel and under-funded service programs. Estimates of the number of abused and neglected children in need of family preservation services continue to climb, and the number of children already in government care who need family reunification services is also increasing.

"In 1977, an estimated 502,000 children were in foster care. By 1980 this number had dropped to 302,000, and it declined further to a low of 275,000 in 1983. During the mid-1980s, however, estimates of the number of children in foster care began to increase reaching approximately 340,000 by the end of 1989. Recent projections estimate that 550,000 children will be in foster care by 1995." National Commission on Children, *Final Report, Beyond Rhetoric: A New American Agenda for Children and Families* 283-84 (1991).

Juvenile and family courts increasingly are overburdened with crowded court dockets and no increase in resources to permit adequate compliance with the

Act's requirements. "The nationally noted upsurge in substance abuse also has served to increase burdens on our nation's juvenile and family court systems. Substance abuse is an element that is present in most dependency cases. Both courts and social service agencies now are struggling with how to evaluate risks to children of substance-abusing families, and identify the family preservation service needs of drug-exposed mothers and infants." *Federally Funded Child Welfare, Foster Care, and Adoption Assistance Programs: Hearings Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 101st Cong., 2nd Sess. 249 (1990)(statement of W.D. Reader, Senior Judge, Stark County Family Court, Canton, Ohio).

In response, Council members and consultants have developed a new, advisory protocol to assist judges confronted by drug and other substance abuse-related issues. "Such a redefinition is necessary because our service system has not previously been constructed to deal with mothers and children with substance abuse problems. New and different types of family-focused services have been created that are both effective and economical. These promising, new, family-centered programs feature a multi-disciplinary approach and early intervention with families. . . . The preservation of one family of one drug-exposed infant can help to ensure the health and safety of present and future siblings, and possibly, future generations. When this can be done for less cost than would otherwise be incurred for the unnecessary dissolution of the family, it makes a compelling case for expansion of such efforts." *Protocol for Making Reasonable Efforts in Drug-Related Dependency Cases*, National

Council of Juvenile and Family Court Judges 3 (1991) (prepublication draft).

The increased demands on juvenile and family court calendars for expanded hearings on increasingly complex abuse and neglect matters, as well as the increase in the number of hearings promulgated by the Act, have strained judicial resources to the limit. Federal researchers have found that this overburdening of the court system has led children whose families cannot be rehabilitated and reunited to continue to be denied the opportunity for a permanent adoptive placement. "Scheduling and conducting court hearings delay implementation of adoption plans. Delays most frequently result from interruptions of proceedings for other civil matters, crowded court dockets, and inability to coordinate the schedules of a variety of hearing participants." R. Kusserow, *Barriers to Freeing Children for Adoption*, ii (1991).

The HHS adoption study recommended that, "[s]tate governments should . . . provide adequate resources to enable State courts to hear and rule on child dependency cases in a timely manner; and offer increased training on permanency planning, in general, and on termination of parental rights, in particular, for child welfare staff, judges, public attorneys, and the staffs of contractual service providers." Kusserow, *supra*, at iii.

C. The Size and Scope of the Problems are Increasing

The child welfare system continues to experience dramatic increases in child abuse or neglect referrals. "Nationwide, child abuse reports increased 31% during the period 1985-1990. During the period 1989-90, an estimated 2,508,000 children were reported to child

protection service agencies as victims of child mistreatment or about 39 out of every 1,000 U.S. Children. The numbers indicate a steady growth in child abuse reports throughout the second half of the 1980s, with annual increases averaging around 5% since 1985." D. Daro and K. McCurdy, *Current Trends in Child Abuse Reporting and Fatalities: The Results of The 1990 Annual Fifty-State Survey*, National Committee for the Prevention of Child Abuse 3 (1991).

The continuing increases in the complexity and severity of abuse and neglect matters have led many juvenile and family court judges to conclude that the amount and quality of social services being offered to children and their families remains inadequate.

The increased review responsibilities and resultant administrative tasks which the AACWA requires of juvenile and family court judges are taxing already overburdened people and systems. The gatekeepers of our nation's foster care system are its juvenile judges. It is state judges who must ultimately decide whether a family in crisis will be broken apart and children placed in foster care or whether placement can be safely prevented through the reasonable efforts of our social service system. If reasonable efforts to preserve or reunify families are not evaluated and ensured through effective judicial review, then families and children are unnecessarily harmed.

D. Private Causes of Action Are Effective Tools for Implementing Statutory Programs Like the AACWA

Given conflicting priorities, it has unfortunately been true that many states have adopted limited programs instead of allocating sufficient resources to faithfully implement the intent of Congress in passing

the AACWA. The private cause of action under federal law is an indispensable tool which serves to assist the nation's juvenile and family court judiciary in the appropriate and just application of the provisions of the AACWA. Such private actions have shown themselves to be an effective and often indispensable means of spurring legislative and executive bodies into more effective implementation of federally-mandated social reforms.

The practical consequence of allowing a private cause of action is to provide incomparable aid to juvenile and family court attempts to ensure "reasonable efforts" to prevent inappropriate foster care, and to speed the reunification of families. The practical consequence of disallowing a private cause of action would be to weaken the AACWA, leaving those children and families who have not been provided with reasonable social service efforts to often ineffective case-by-case review of individual agency decisions.

Federal courts have often been called upon to decide whether state governments are complying with federal social programs. The decisions of this Court that have recognized the existence of private causes of action under a variety of federal statutes have established a body of precedent that has been effectively used by counsel for beneficiaries of federal programs to obtain their statutorily-mandated benefits. The realities of diminishing government resources and entrenched administrative practices have often meant that the only effective tool for obtaining compliance has been the private cause of action in which a federal judge is asked to review systemic problems and take appropriate action to obtain compliance with congressional mandates. While some would argue that it is

preferable to avoid such federal judicial involvement with state activities, our federal system recognizes and enforces the supremacy of federal law and state judges have adjusted to the involvement of the federal judiciary in obtaining compliance with law.

In assessing the necessity for private causes of action, it should be noted that the beneficiaries of the AACWA—neglected and abused children—are among the least politically powerful segments of our society. Unable to participate directly in the political process, children depend upon the efforts of their parents, guardians, friends and counsel for effective implementation of their legal rights. The Council strongly believes that those rights require the presence of a federal private cause of action to maximize the possibility that these children will be treated as Congress intended.

The Council believes that the existence of a judicially-enforceable private action to assure compliance with the "reasonable efforts" provision of the AACWA will prompt improvements in the range and availability of family preservation services. Services to ensure the safety of children within their own families will receive new attention. There will be an increase in the level of cooperation between disciplines, including the judiciary, social service agencies, attorneys and child welfare advocates. The number of unnecessary out-of-home placements will be reduced, ensuring that as many children as possible have stable, caring families not only during their early years but for a lifetime.

There are limits on what individual judges and individual jurisdictions can hope to achieve. Court rulings of non-compliance in individual cases have little,

if any, systemic effect on social service agency administration of abuse and neglect cases. The private cause of action is an indispensable tool to increase compliance with provisions of the Act.

II. A PRIVATE CAUSE OF ACTION FOR SYSTEMIC FAILURES WILL NOT INTERFERE WITH THE ROLE OF STATE JUDGES

Several of the briefs filed in this case argue that the recognition of a federal private cause of action will improperly interfere with the role of state judges in adjudicating individual cases under applicable state law. Those briefs also argue that Congress intended that the judicial implementation of the AACWA would rest with state, not federal, judges and stress that federal courts have historically declined to take jurisdiction in domestic relations or family law matters. *See* Brief for the Petitioners at 32-33, Brief of the United States as *Amicus Curiae* at 22-26, Brief of the States as *Amicus Curiae* at 11-13. The Council submits that those arguments are misplaced and rest on a fundamentally flawed understanding of the limits of a federal court action in implementing the AACWA.

The Council endorses the recognition of a federal private cause of action to remedy systemic problems such as those at issue in this case. That endorsement does not, however, mean that the federal courts would take over the state courts' responsibility for adjudicating individual cases. The Council would draw a distinction between private causes of action seeking redress for programmatic deficiencies and such actions that seek only to review individual placement or care decisions. This Court is perfectly capable of fashioning a judicial remedy that meets the needs of the system without improper federal exercise of state

court functions. Existing doctrines of abstention or primary jurisdiction can, we believe, be readily adapted to direct the federal courts in the proper direction.

If, as the petitioners contend at page 38 of their brief, some lower federal courts have failed to recognize proper bounds of their authority and have failed to abstain from involvement in particularized determinations of "reasonable efforts," this Court can use this case not only to recognize the existence of a private cause of action under existing law, but to outline the proper limits of that action. This Court's experience in adjudicating delicate issues of federalism has led to a continuing development of principles of abstention and primary jurisdiction. *See, e.g., Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) (federal courts should abstain from enjoining ongoing state criminal prosecutions); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975) (federal courts should abstain from enjoining civil nuisance proceedings); *Penzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987) (federal court should have abstained from interferring in issues of adequate bond pending appeal in a civil case). The general principle, as most recently stated by this Court, is that federal courts should abstain from interfering with state judicial proceedings "involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *New Orleans Public Serv. v. Council of New Orleans*, 491 U.S. 350, 368, 109 S.Ct. 2506, 2518, 105 L.Ed.2d 298, 317 (1989). Since individual child welfare determinations are uniquely appropriate for state, not federal, judicial determination,

existing principles dictate that any private enforcement action under 42 U.S.C. § 1983 not extend to federal judicial oversight of state court determinations in specific cases.

The Council does not see any unacceptable interference in state judicial functions from federal judicial oversight of systemic issues of compliance with the mandates of the AACWA. Decisions on the adequacy of state regulatory systems, general plans and allocations of resources do not threaten judicial determinations in individual cases. This Court's historical reluctance to involve the federal judiciary in domestic relations matters, *see, e.g., Barber v. Barber*, 62 U.S. (21 How.) 582, 16 L.Ed. 226 (1859), does not necessitate a wholesale abdication of a federal judicial role in implementing the AACWA simply because the Act deals with family law matters. Effective implementation of federal statutes is an entirely proper concern of federal courts. Indeed it would be unusual for federal courts to abandon the field of federal statutory interpretation just because a statute touches an area of family law.

We do not question the wisdom of decisions such as *Thompson v. Thompson*, 484 U.S. 174, 108 S.Ct. 513, 98 L.Ed.2d 512 (1988), where this Court decided a federal court should not determine the validity of two conflicting custody decrees under the authority of a federal statute. The issue in that case was one of individualized determinations based on state law. The Council recognizes that such individualized decisions are indeed the proper province of the state judiciary and we seek no change in that established limit on federal jurisdiction. At the same time, the Council believes that statewide issues of compliance

with a federal statute are problems beyond the proper role of a local state court judge, which are more properly addressed to a federal judge with broader authority and experience. Juvenile and domestic relations judges are well-versed in family law issues and are the proper primary judicial authority in that field. Those same judges are not as experienced in broad issues of federal statutory construction and the difficult and delicate issues raised when a court is asked to order a state agency to comply with federal law.

It may be that the line between proper and improper use of federal judicial power under the AACWA is not now a bright and clear one. It may be that the proper allocation of state and federal judicial functions cannot presently be defined with absolute precision. That problem, inherent in all adjudication of new issues, should not lead to an abandonment of a federal judicial role. It should instead lead to a reasoned decision that considers all aspects of the problem and announces guidelines that reflect an appropriate balance of state and federal expertise.

III. THE COUNCIL TAKES NO POSITION ON WHETHER THE AACWA IN ITS PRESENT FORM CREATES A PRIVATE CAUSE OF ACTION

We noted at the outset that the 1989 Council Resolution calls for the amendment of the AACWA "to clarify that there is a private cause of action" under the AACWA. The Council as a matter of policy strongly endorses the recognition of such a cause of action as to systemic issues of compliance. The Council strongly believes that the early recognition of such a cause of action would significantly improve implementation of the AACWA and significantly benefit the thousands of children who are the Act's intended

beneficiaries. The Council does not, however, seek to advise this Court on the legal issue of interpreting the existing statute. That task is, we recognize, properly a judicial function to be guided and affected by the Court's own research and experience and the briefs of the parties. The Council seeks only to inform this Court of its strongly-held views of what legal structure it believes would best serve the interests of the children as well as the state judiciary. If the attainment of that goal is properly reached by interpretation of the existing statute, the Council would obviously welcome that result. If, on the other hand, this Court concludes that the legal and policy arguments advanced in support of the recognition of a federal cause of action are more properly addressed to the Congress, the Council is prepared to continue its involvement in seeking legislative action consistent with its goals and the welfare of the individuals whose rights are at stake.

CONCLUSION

Implementation of the AACWA will be strengthened by recognition of a federal private cause of action. The ability of the state courts to best serve the needs of children will be enhanced by the recognition of such a right. This Court has the ability to fashion appropriate guidance for limiting federal judicial intervention to systemic issues, leaving to the state judiciary individualized determinations. In deciding whether the AACWA as it now exists authorizes such a private cause of action, the Council asks only that this Court understand that not all state judges who are significantly governed by the provisions of the AACWA fear or oppose recognition of such a private

right, but instead see it as a positive addition to the resources available to insure compliance with law and service to the needs of the individuals who appear before our courts.

Respectfully submitted,

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INTEREST OF THE AMICI CURIAE[1]

Amici are organizations joined in their concern for the well being of children involved in the child welfare system. While their approaches and points of contact with these children vary widely, all amici are united in their conviction that enforcing the reasonable efforts requirement of the Adoption Assistance and Child Welfare Act of 1980 ("AACWA") is essential to serving the best interests of these children.

Amici represent a wide range of child welfare practitioners, consultants, and volunteers involved in the delivery of services to children in their own homes, in foster care, and in adoptive placements. Prior to the adoption of the AACWA, amici witnessed the tremendous harm caused to children by unnecessary or prolonged foster care placement, and many were actively involved in reforming the system by pressing for the enactment of the AACWA. Sadly, amici continue to witness the same harm to children where the AACWA is not implemented.

As organizations that work with children, families, and child welfare systems, amici are intimately familiar with the social work standards and principles incorporated in the reasonable efforts requirement. Because these principles govern amici's work every day, it is clear to amici that the reasonable efforts requirement constitutes a coherent, applicable standard against which child welfare services can be judged.

The American Association for Protecting Children, a division of the American Humane Association, is a national,

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[1]Counsel for both petitioners and respondents have consented to the filing of this brief. Their consents are on file with the Clerk.

nonprofit organization, founded in 1877, that is engaged in research, training, consultation, evaluation and public education regarding child abuse and neglect and its causes and effects on children and families.

The Association of Child Advocates ("ACA") is a national association which provides leadership and services to state and local child advocacy organizations in the United States. ACA has one hundred and nine member organizations in forty-four states.

The Association of Junior Leagues International is an organization of women, with a collective membership of nearly 200,000, committed to improving the community through the effective action of trained volunteers. These Leagues have a long-standing commitment to improving and expanding the provision of services to children and families.

Catholic Charities USA is a nationwide network of 1,200 agencies and institutions which provide a continuum of services to vulnerable children and families, including family support, adoption services, foster family care and a range of other residential care services.

Family Service America ("FSA"), founded in 1911, is dedicated to strengthening family life in North America through services, education and advocacy. FSA's network of 285 community-based, multi-service support agencies-- many of which have been providing services in their communities for over 100 years-- provide an array of services to families and children.

The Children's Defense Fund ("CDF") is national nonprofit advocacy organization that for 15 years has pursued reforms on behalf of children who are at risk of placement or already in the care of the child welfare system. CDF was

involved in the development and enactment of the AACWA, and has worked with state and local providers, legislators, organizations of foster parents and adoptive parents, and other child advocates for over a decade to see that its services and protections are implemented.

The National Black Child Development Institute ("NBCDI"), founded in 1970, has diligently endeavored to improve the quality of life for Black children and families. In 1980, NBCDI testified before Congress and worked on behalf of the AACWA.

The National Association of Social Workers ("NASW") is the largest association of professional social workers in the world, with over 135,000 members in 55 chapters throughout the United States and abroad. NASW is devoted to promoting the quality and effectiveness of social work practice, advancing the knowledge base of the social work profession, and improving the quality of life through utilization of social work knowledge and skills.

The National Court Appointed Special Advocate ("CASA") Association is comprised of 452 programs which provide 19,000 CASAs, or volunteer Guardians ad Litem, to advocate for the best interests of 81,000 abused and neglected children in juvenile court proceedings. CASA volunteers provide information to assist the courts in determining if reasonable efforts were made by the child welfare agencies.

The National Foster Parent Association is an organization of 3,500 members representing over 100,000 foster parents nationwide who are caring for 407,000 children currently in the custody of child welfare systems across the country. The Association and its members have long been concerned that many child welfare agencies are not affording

children in their custody the protections and services to which they are entitled under the AACWA.

The North American Council on Adoptable Children is a coalition of adoptive parents and adoption professionals that has advocated, since its inception in 1974, for children who are waiting for adoption.

SUMMARY OF ARGUMENT

The Adoption Assistance and Child Welfare Act of 1980 ("AACWA") was enacted in response to extensive evidence that state child welfare systems were harming the very children they were designed to protect. In particular, child welfare experts were concerned that children were being placed unnecessarily in foster care in ever increasing numbers, and left to languish there for years without any coherent plan for their future. This increasing reliance on foster care was clearly detrimental to children. At a minimum, children were traumatized by their separation from their families; at worst, that psychological trauma left life-long scars, preventing them from developing healthy attachments or a healthy sense of self, even in adulthood. For most children, foster care guaranteed instability -- children moved from home to home, from school to school, from one set of neighbors and "siblings" to another. Foster care limbo, as it came to be known, deprived these children of a most basic need, a permanent family, whether biological or adoptive.

In enacting the AACWA, Congress intended to change these children's fates. Based on the standards articulated by child welfare specialists, Congress carefully crafted a set of basic requirements designed to alter the way states implemented their child welfare programs. Principle among these was the requirement that states make "reasonable efforts" to prevent the necessity of removing children and to

speed reunification of children where removal proved necessary. Along with additional requirements for case plans and judicial review, the reasonable efforts requirement was intended to protect children's best interests by ensuring that states would provide services to preserve biological families whenever possible, and would seek to reunify families as quickly as possible if removal was necessary. The AACWA also required that states attempt to find a new permanent home for a child as swiftly as possible if reunification proved impossible.

The statutory reasonable efforts requirement was derived from clear social work standards, and can be readily judged against these standards. Certain preconditions of any effective service delivery are well recognized in social work practice, and are clearly encompassed in the core of reasonable efforts.

The most important, and universally recognized, requirement of an adequate system is the immediate and ongoing involvement of a caseworker in every case requiring state intervention. A caseworker is the troubled family's life line. Without a caseworker, many children will be unnecessarily removed from home. Without a caseworker, a parent has no way of contacting a child in foster care, of developing a plan for change, of accessing needed services. Without a caseworker, minor problems can be transformed into crises. Even a brief gap in caseworker coverage falls below established social work standards, and cannot be characterized as reasonable.

Because the reasonable efforts requirement accords with, and can be measured against, basic, commonly held social work principles, it is neither vague nor unenforceable. And because enforcement of the reasonable efforts requirement is essential to the protection of children's best interests, amici

urge this Court to affirm the decision of the United States Court of Appeals for the Seventh Circuit.

ARGUMENT

I. THE PROVISIONS OF THE AACWA ARE NEEDED TO PROTECT CHILDREN

A. The AACWA Was a Response to Inappropriate Use of Foster Care That Had Been Well-Documented by Child Welfare Experts

In order to understand the importance of the reasonable efforts provisions of the AACWA,[2] it is useful to examine the problems in the child welfare system that led to its passage. The AACWA grew out of "(s)tudies of the child welfare system which . . . highlighted a number of weaknesses in the operation of social services systems and in the provision of services to children and their families." T. Stein & G. Comstock, Reasonable Efforts: A Report On Implementation By Child Welfare Agencies In Five States, American Bar Association, National Legal Resource Center For Child Advocacy and Protection 1 (1987). These studies showed that many abused and neglected children were being harmed by a system that was supposed to protect their well-being. Of particular concern was the states' lack of efforts to prevent unnecessary foster care placements or to reunite children with their families. See, e.g., Children's Defense Fund, Children Without Homes: An Examination of Public Responsibility to Children in Out-of-Home Care (1978); National Commission

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[2] 42 U.S.C. § 671(a)(3), (15), requires a "plan . . . in effect in all political subdivisions of the State . . . [that] provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home."

on Children in Need of Parents, Who Knows? Who Cares? Forgotten Children in Foster Care (1978); A. Shyne & A. Schroeder, Administration for Children, Youth and Families, U.S. Dep't of Health, Educ. and Welfare, National Study of Social Services to Children and Their Families (1978); D. Fanshel & E. Shinn, Children in Foster Care: A Longitudinal Investigation (1978); Governor's Advocacy Council for Children and Youth, "Why Can't I Have a Home?" A Report on Foster Care and Adoption in North Carolina (1978); New Mexico Dep't of Human Services, In Limbo: A Study of New Mexico's Foster Care Children (1978); R. Gruber, Children in Foster Care: Destitute, Neglected . . . Betrayed (1979); C. Masem, Human Services Providers Ass'n of Ark., Child Welfare in Arkansas (1979); State Soc. Welfare Board, Calif. Health and Welfare Agency, Children Waiting: Report on Foster Care (1972).

1. Unnecessary Foster Care Placements

Beginning in the early 1960's, the number of children placed into foster care throughout the United States increased substantially. The increase reflected the growing number of reports of abuse and neglect and an escalating incidence of family breakdown. Child protection agencies often removed children from their families as a first step, rather than trying to work with families to resolve the problems threatening the well-being of their children. See Mnookin, Foster Care--In Whose Best Interest?, 43 Harv. Educ. Rev. 599, 602 (1973); T. Stein & G. Comstock, supra p. 7, at 1. As a result, the number of children in foster care due to child abuse or neglect grew from approximately 75,000 in 1963 to over 300,000 in 1980. See Besharov, The Misuse Of Foster Care, 20 Child Welfare 213, 218 (1986).

By the early 1970's, it had become clear that many children were being harmed, rather than helped, by their

placement in foster care. As John Bowlby, a world-renowned psychiatrist, had forewarned as early as 1950, separating children from their families is extremely traumatic to children, even children who have received less than adequate care. J. Bowlby, Child Care And The Growth Of Love 13-20 (2d ed. 1965). Bowlby emphasized that because most children -- even mistreated children -- are emotionally attached to their parents, any disruption of the parent-child relationship is, at a minimum, extremely painful to a child; moreover, such disruptions can impair permanently the child's ability to form future relationships and develop into a healthy adult. Separation from the natural family for any period of time may be damaging to the development of a child. See, e.g., C. Heinicke & I. Westheimer, Brief Separations (1965).

The ideas of Bowlby were reinforced and elaborated by Joseph Goldstein, Anna Freud, and Albert Solnit. In their classic book, Beyond The Best Interests Of The Child (1973), they stressed that a child's most basic psychological need is for continuous and stable care to promote successful development. Goldstein, Freud and Solnit continued to emphasize the risks of separation in their later work:

> To be orphaned without separation, to be forced to dismantle existing emotional ties and fashion new ones with hitherto unknown people, is no easy task for any human being. Children are especially unequipped for such losses.

J. Goldstein, A. Freud & A. Solnit, Before the Best Interests of the Child 53-54 (1979).

Researchers also found that foster placement entails other psychological risks for children, all of which can leave permanent developmental scars. See Wald, State Intervention

on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 623, 644-46 (1976). Many children blame themselves for the separation. N. Littner, Some Traumatic Effects Of Separation And Placement (1956). They may experience abandonment, rejection, fear, worthlessness, despair, humiliation and helplessness. R. Geiser, The Illusion of Caring: Children in Foster Care 35-38 (1973). Foster children also experience identity problems, conflicts of loyalty, and anxiety about their future. E. Weinstein, The Self-Image of the Foster Child 15 (1960).

In addition to concern over psychological harm associated with removal, experts in child welfare pointed out a number of other problems with the inappropriate use of foster care. They recognized that it is far easier to work with families when the child remains at home than when the child is in out-of-home care. See Gambrill & Wiltse, Foster Care: Prescriptions for Change, 32 Pub. Welfare No.3, 39, 40 (Summer 1974). Therapists are able to observe directly the types of interactions that lead to abuse, neglect, or family conflict and to design interventions that can alter both parent and child behavior. See S. Minuchin, Families of the Slums 244-297 (1967).

It also was pointed out that unnecessary placements strained the already limited resources of the child welfare system. See Wald, supra p. 9, at 645-646. Supervising children in foster care requires more caseworkers than supervising children at home, since services must be provided to both the biological and foster homes. Moreover, excessive and inappropriate use of foster placement lessens the capacity of the foster care system to respond appropriately when out-of-home placement is necessary. It becomes more difficult to find well-qualified foster parents and to offer them

appropriate supports. As a result, many children were being placed in inadequate settings, where they suffered further abuse and neglect. Id.[3]

In addition to documenting the harms of foster care, research by child welfare experts demonstrated that in many cases an immediate offer of services could have prevented removal. See Gambrill & Wiltse, supra p. 10, at 39-40; American Public Welfare Association, Standards For Foster Family Services, Standard XVIII (1975). Sometimes the parents only needed help in finding services, such as day care or suitable housing. In other instances, the availability of a homemaker or public health nurse would have prevented the need for removal.[4]

Often, the removal of children from their homes had little to do with either the children's safety or the service needs of their parents. In too many cases, no services were provided between the time of removal and a decision to return the child. The child was removed, and remained in care, merely because understaffed agencies were slow in investigating the safety of the home or in determining the type of services that would enable the parents to provide adequate care. These unnecessary placements were being paid for by federal dollars.

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[3] This remains a problem today. Ironically, the absence of adequate foster homes also sometimes results in children being left at home who should be placed in foster care. See Besharov, The Politics of Foster Care, The American Enterprise, Jan.-Feb. 1990, at 16.

[4] The lack of services that would prevent the need for removal continues to plague the child welfare system today. See Schuerman, Rzepnicki, Littell, & Budde, Some Realities in The Implementation of Family Preservation Services, in Conference Proceedings, Child Welfare Reform Experiments, American Enterprise Institute (Feb. 1991) [hereinafter cited as Schuerman].

Thus, in the years just prior to the passage of the AACWA, both practitioners and researchers in the child welfare community supported the conclusion that had been reached by the Children's Bureau of the United States Department of Health, Education and Welfare over twenty years earlier: "(W)henever possible, children should be permitted to remain in their own homes with services provided through probation or protective supervision." U.S. Department of Health, Education, and Welfare, Standards for Juvenile and Family Courts 81 (1956).

2. Foster Care Drift

In addition to unnecessary placements, experts pointed to another major deficiency in child welfare agency practice that threatened the well-being of children. Even in those cases where removal was appropriate, children were left to drift in foster care without either being reunified with their families or provided new, permanent families through adoption. See E. Sherman, R. Neuman & A. Shyne, Children Adrift In Foster Care (1973). Numerous studies demonstrated that while the foster care system was conceived of as a temporary expedient, foster placement generally proved to be far from temporary; the majority of children remained in foster care for years, in many cases for their entire childhood. H. Maas & R. Engler, Children In Need Of Parents (1959); D. Fanshel & E. Shinn, supra p. 8.

Moreover, many children were moved from foster home to foster home. Subjecting children to multiple placements severely jeopardizes their development. Every move requires the child to make the difficult adjustment to new caretakers, foster "siblings," new neighborhoods and, significantly, to new schools. Each move threatens to undermine the child's academic achievements. Of even greater concern to child development specialists, multiple

placements prevent children from developing the attachment to a nurturing, caring adult that is so crucial to a child's development. As two experts wrote in 1971, "(N)o child can grow emotionally while in limbo.... He cannot invest except in a minimal way ... if tomorrow the relationship may be severed." Bryce & Ehlert, 144 Foster Children, 50 Child Welfare 499, 503 (1971). See also Wald, supra p. 9, at 645-46.

As the evidence of foster care drift mounted, child welfare experts recognized that in order to provide foster children with permanent homes, they either had to be reunited promptly with their biological parents, or moved toward adoption after a swift determination that reunification would not work. Unfortunately, most child welfare agencies failed to make adequate (or any) efforts to reunify children with their parents; nor did they work towards adoption. See Wiltse & Gambrill, Foster Care, 1973: A Reappraisal, 32 Pub. Welfare No.1, 7 (Winter 1974); Children's Defense Fund, supra p. 7, at 5-9; National Commission on Children In Need Of Parents, supra p. 7, at 5-8.

To alleviate this situation, experts pointed to the essential need to make reasonable efforts at reunification. See American Bar Association -- Institute For Judicial Administration, Juvenile Justice Standards Project, Standards Related To Child Abuse And Neglect 131-134 (1977) [hereinafter cited as A.B.A.-I.J.A.]; Gambrill & Wiltse, supra p. 10, at 40-46. A requirement that reasonable steps be taken to promote reunification was regarded as critical to children for several reasons. First, early reunification is the best way of protecting the emotional well-being of many children, provided that the problems that resulted in removal are corrected. The majority of children placed in foster care mourn the loss of their family and eagerly await reunification. See T. Baily & W. Baily, Child Welfare Practice (1983). For

many children, no other caretakers can replace their parents, no matter how competent or caring the other caretakers.

Moreover, for some children reunification is the only available alternative to growing-up in a series of unstable foster placements. These are cases where, due to the child's age, emotional problems, or other characteristics, it is extremely difficult to find an adoptive home or a single, long-term foster placement. In these cases, absent reunification, the number of multiple placements greatly increases, causing further emotional damage to the child.

Less obvious, but equally important, reasonable efforts to reunify families is crucial even if such efforts prove unsuccessful. When parents are unable to change their abusive or neglectful behavior, even after they have received good treatment services, the best resolution for the child often is termination of parental rights, so that the child can be adopted by another family. However, judges and social workers are extremely reluctant, and indeed, may be barred by state law, from terminating parental rights, even in appropriate cases, unless efforts at reunification have been made. Terminations and subsequent adoptions were extremely rare in the period prior to the adoption of the AACWA, in part because many agencies failed to make adequate efforts at reunification.

In sum, prior to the passage of the AACWA there was overwhelming evidence that the child welfare system was not meeting the needs of children. Despite the consensus among experts in child welfare with respect to good practices, and the substantial evidence that these practices could be implemented successfully, see Emlen, The Development of the Concept of Permanency Planning, in Foster Care Reform In The 70's: Final Report Of The Permanency Planning Dissemination Project (Reg. Research Inst. Portland State University 1981);

Steketee, The CIP Story, 28 Juv. Just. No. 2, 4 (May 1977), the majority of agencies in the United States were not adhering to these practices. See Comptroller General of the United States, Children in Foster Care Institutions--Steps Government Can Take To Improve Their Care (1977).

While the federal government paid a large percentage of the costs of foster care and contributed to the costs of other child welfare services, the federal statutes did not require states to comply with practices generally accepted to be the minimum needed to protect children. Indeed, the AACWA's predecessor, Title IV-A of the Social Security Act, 42 U.S.C. §§601-615 (1976 & Supp. V 1981), encouraged substandard practices with its vague requirements and a reimbursement scheme favoring foster care. As a result, states had an economic incentive to overuse foster placement and to allow children to remain in such care indefinitely. It was this situation that the AACWA was designed to rectify.

B. The AACWA Was Designed To Alleviate These Problems

Both committee reports and floor statements during the AACWA's several-year development repeatedly recognized unnecessary foster care placements and foster care drift as the fundamental problems the statute was designed to remedy.[5] In first introducing the bill in the 95th Congress,

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[5] Contrary to the claims of petitioners, see Brief for Petitioners at 22-26, Congress clearly concluded that the evidence demonstrating the harms of placement justified a policy of trying to prevent placement, provided that this could be done without risking further harm to the child. There was no dispute among social work professionals that making reasonable efforts to preserve families was the best way of protecting children. This remains the view today. See infra pp. 18-22.

the lead House sponsor spoke of the importance of these problems and the need to redirect federal priorities:

> The issue is not whether we will spend Federal funds on these children and families, but when. We can either adequately support preventive service programs which can keep families together, or ignore the developing crisis and continue to pay hundreds of millions of dollars annually to maintain them in long term foster care, without any benefit to them or their families.

123 Cong. Rec. 9916 (March 31, 1977) (statement of Rep. Miller). See also 125 Cong. Rec. 22681 (August 3, 1979) (statement of Sen. Cranston) (arguing for "maintaining [children] with their own families or finding new adoptive families for them").

Upon passage, Senator Cranston contrasted the "very generalized" provisions of prior law with the "specific requirements that states must include in their Title IV-E program plan provisions to assure that in each case reasonable efforts be made prior to the placement of a child in foster

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Moreover, the substantive law of virtually every state explicitly recognizes that children should be removed only if removal is necessary to protect them from future harm. See, e.g., Cal. Welf. & Inst. Code § 361(b)(1) (Deering Supp. 1991) (no child shall be removed from home unless there is substantial danger to the child's health and there are no reasonable means that the child's health can be protected without removing the child); Minn. Stat. Ann. § 260.011(Subd.2)(a) (West Supp. 1991) (the purpose of the juvenile laws is to preserve and strengthen the child's family ties, removing a child from parents only when a child cannot be adequately safeguarded without removal). See also, M. Soler et al., Representing the Child Client, § 4.08(3)(b)(ii) (1991). Thus, the brief of petitioner sets up a false conflict between the AACWA and state laws.

care to prevent or eliminate the need for removal of a child from his home and that reasonable efforts be made to make it possible for a child to return" to the home. He described these provisions as "among the most important aspects of this legislation." 126 Cong. Rec. 14767 (June 13, 1980) (emphasis added).

Moreover, testimony before the Senate Committee on Finance emphasized that state agencies well understood the direction being considered by Congress and saw the demands created as manageable. The Commissioner for the New York State Department of Social Services, for example, testified about that state's policies which required an emphasis "on services to prevent or shorten foster care placement," and about standards being developed in the state to define the "minimum tasks and activities that agencies must undertake to assure sound planning for children in foster care." Among these practices were "intake procedures which emphasize services to avoid placement, planning for return to the family or other permanent arrangements...." Proposals Related to Social and Child Welfare Services, Adoption Assistance and Foster Care: Hearings on H.R. 3434 Before the Subcomm. on Public Assistance of the Senate Comm. on Finance, 96th Cong., 1st Sess. 117 (1979) (statement of Barbara Blum, Commissioner, NY State Department of Social Services).

The requirements that were so central to the AACWA's overhaul of the foster care system were threefold: 1) that reasonable efforts be made to prevent removal or to reunify families as rapidly as possible; 2) that the supervising agency develop a case plan for each child in foster care, which details the efforts that are to be made towards these ends; and 3) that a permanency planning hearing be held within eighteen months of placement, so that children who cannot be returned to their parents will be provided a new permanent home.

42 U.S.C. §§671(a). Congress viewed each element as critical to a properly functioning child welfare system.

C. The Reasonable Efforts Requirement is Central to the AACWA's Goal of Furthering the Best Interests of Children.

The AACWA establishes an overall system of intervention that will protect the interests of children and families, if all of the elements are in place. The central goal of the AACWA is to ensure that states receiving federal funds adopt procedures designed to provide children with safe, secure and stable homes. Consistent with the research and clinical findings of child welfare professionals, the AACWA requires that child protection agencies first explore whether this safety and stability can reasonably be provided in the child's own home. When that proves impossible, the AACWA requires the system to focus on providing each child with an adoptive or other permanent home.

The reasonable efforts clause stands at the heart of this system. It is the base on which the requirements of case planning and permanency planning hearings are built. Case plans and review hearings are the tools that are used to try to get decision-makers to focus on each child's needs in an organized and timely fashion. But the actual protection of these needs occurs only if agencies make reasonable efforts with respect to preventing removal and facilitating reunification. Thus, the AACWA's highly structured process depends upon a system in which reasonable efforts are routinely made.

The procedures required by the AACWA reflected the best professional thinking with respect to social work practice. In fact, the AACWA "was the product of the study and work of prominent judges, law professors, attorneys, social work

professionals, and mental health professionals throughout the United States." American Bar Association, National Legal Resource Center for Child Advocacy and Protection, The Adoption Assistance and Child Welfare Act of 1980; An Introduction for Juvenile Court Judges 1 (1983). The requirements closely paralleled standards recommended by a multi-disciplinary national commission of child welfare professionals established by the American Bar Association to review the legal response to child abuse. See A.B.A.-I.J.A., supra p. 13.

These provisions also embodied the standards for protecting children recommended by the American Public Welfare Association and the Child Welfare League of America, associations that represent child welfare agencies throughout the country and that are dedicated to fostering high quality child welfare services. See, e.g., American Public Welfare Association, Standards For Foster Family Services, supra p. 11; Child Welfare League of America, Standards For Child Protective Service (1973).

Thus, amici totally disagree with the claims by petitioner that the provisions of the AACWA are in any way inconsistent with the best interests of children. "The Child Protective Service response to child abuse, neglect, and exploitation has as its fundamental purpose the protection of children through enabling parents to better fulfill their parenting role." Child Welfare League of America, Standards for Service for Abused and Neglected Children and Their Families 4 (1984); see also id. at 21. Congress required reasonable efforts precisely because it concluded, on the basis of expert testimony, that it is in children's best interests for agencies to explore whether a child can be protected in her or his home and whether reunification is possible if a child must be removed.

It must be recognized, moreover, that the reasonable efforts requirement does not require that a child be kept at home, or that a family be reunited. It is still up to the state court, applying state substantive standards, to determine whether a child can be maintained safely at home. The AACWA requires only that agencies consider whether, in light of a state's substantive law, removal can be prevented, or reunification facilitated, and that agencies make reasonable efforts to achieve those ends. Petitioners' implication to the contrary is thus not relevant to the issues in this case. See Brief for Petitioners at 23 n.10.

In fact, since the passage of the AACWA, the judgment of Congress that the well-being of children will be enhanced when states make reasonable efforts has been borne out by experience. It has been demonstrated, in recent years, that when the AACWA's structure is implemented, and child welfare agencies make reasonable efforts to provide appropriate services, the great majority of children who come to the attention of child welfare agencies can be kept safely at home. See T. Ooms & D. Beck, Keeping Troubled Families Together: Promising Programs and Statewide Reform, American Association For Marriage and Family Therapy (1990); J. Whittaker, J. Kinney, E. Tracy & C. Booth, Family Preservation Services: Research and Evaluation (1990). The states that have implemented new programs to prevent removal have demonstrated how effective reasonable efforts can be. See Center For The Study Of Social Policy, State Family Preservation Programs: A Description Of Six States' Progress in Developing Services to Keep Families Together (Working Paper FP-3) (1988).[6] And, just recently, two highly

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[6] In addition to the important benefits for children, quality in-home services are also cost-effective. See Smith, Family Preservation Services: State Legislative Initiatives, National Conference of State Legislatures 1 (1991); Child Welfare League of America, National Council of Juvenile and

prestigious national commissions studying the risks facing children and families have called for increased investments in services and programs designed to strengthen and preserve families and avoid the need for unnecessary foster care. American Public Welfare Association, National Commission on Child Welfare and Family Preservation, A Commitment to Change 5-7, 23-27 (1990); National Commission on Children, Beyond Rhetoric: A New American Agenda for Children and Families 296-301 (1991).

Unfortunately, despite the efforts of national organizations like amici, far too many jurisdictions still are failing to implement the basic mandates of the AACWA. Many children still are being removed unnecessarily because of the failure of agencies to make reasonable efforts to prevent removal. See, e.g., Chicago Bar Association, A Report to the President of the Chicago Bar Association (1989); Schuerman, supra note 4. Many children remain in foster care limbo because of agency failures to provide meaningful reunification services. See, e.g., National Black Child Development Institute, Who Will Care When Parents Can't? A Study of Black Children in Foster Care (1989); National Black Child Development Institute, Parental Drug Abuse and African American Children in Foster Care (1991); Select Comm. on Children, Youth and Families, U.S. House of Representatives, No Place to Call Home: Discarded Children in America (1990). And judges still are refusing to order termination of parental rights because agencies have not made reasonable efforts at reunification. See Office of

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Family Court Judges, Youth Law Center, and National Center for Youth Law, Making Reasonable Efforts: Steps for Keeping Families Together, 8 (undated) [hereinafter cited as Making Reasonable Efforts].

Inspector General, Department of Health and Human Services, Barriers to Freeing Children for Adoption (1991).[7]

Thus, the intent of Congress in enacting this statute is being thwarted. Even more significantly, from the perspective of amici, children are not receiving the services they need and to which they are entitled.

II. THE BASIC ELEMENTS OF REASONABLE EFFORTS ARE ROOTED IN COMMON UNDERSTANDINGS AND ARE READILY SPECIFIED

A. The Basic Concept

Petitioners' major argument in this case appears to be that the term reasonable efforts has no common meaning and therefore is not readily enforceable by a federal court. To amici, whose members work with this term every day, this claim is clearly wrong. The basic elements of a system for making reasonable efforts are neither vague nor unenforceable. They are specified in the standards of national organizations, such as the Child Welfare League of America ("CWLA") and National Association of Social Workers and

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[7] A recent 20-state survey by the Inspector General concluded that the states' failure to make reasonable efforts to reunite families "delays implementation of adoption plans for many children and prevents it for others.... Over 75% of the respondents in the state survey indicate that the inability of the child welfare agencies to meet the 'reasonable efforts' standard to the satisfaction of the state courts in a timely manner is the primary barrier to implementing permanent plans of adoption." Office of Inspector General, supra p. 21 (emphasis in original). In fact, under many state statutes, judges may be precluded from terminating parental rights unless it is proven that reasonable efforts at reunification were made and failed. See, e.g., Conn. Gen. Stat §§ 17-43a(b) (1989); Mo. Ann. Stat. §§ 211, 447 (Vernon 1991).

are well-defined in professional literature. See, e.g., CWLA, Standards for Child Protective Service (1973); CWLA, Standards for Organization and Administration for all Child Welfare Services (1984); CWLA, Standards for Own-Home Service (1984); CWLA, Standards for Foster Family Service (1986); CWLA, Standards for Service for Abused or Neglected Children and Their Families (1989); National Association of Social Workers, NASW Standards for Social Work Practice in Child Protection (1981) [hereinafter cited as NASW Standards]; Making Reasonable Efforts, supra note 6; T. Stein, Child Welfare and the Law (1991).

In essence, in order to make reasonable efforts to prevent removal, a child welfare agency must do three things before removing a child from her or his home:[8]

1. Identify the factors that are placing the child at risk of further abuse or neglect, that is, the factors that might necessitate removal;

2. Explore whether there are services that could be provided to the parents and/or child that would reduce the risk to the child to a point where it would be safe to leave the child at home;

3. Offer such services to the family, when such services can be reasonably provided. CWLA, Standards for Service for Abused or Neglected Children and Their Families, supra, at 9.

Reasonable efforts at reunification require the agency to:

1. Identify those factors that must be changed in order for the child to be returned to the parents;

2. Identify the services that are needed to help the parents accomplish these changes;

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[8] These actions are not required prior to placement in emergency situations, where the child is threatened with serious imminent harm unless placed.

3. Develop a case plan for providing these services;

4. Offer such services to the parents, to the extent that they can be reasonably made available, and facilitate the delivery of the services.

The exact services needed to prevent removal, or to facilitate reunification, will, of course, vary from one individual case to another. The decision as to the reasonableness of the specific services is decided by the juvenile court judge in each case.[9] However, in every case it is essential that there be a professional social worker assigned to the case; without a caseworker there can be no reasonable efforts. It is the caseworker who is responsible for developing and administering the case plan for preventing removal or facilitating reunification; the case plan is both a requirement of the AACWA and the linchpin of any agency efforts to work with families. CWLA, Standards for Organization and Administration for all Child Welfare Services, supra p. 23, at 68; B. McGowan & W. Meezan, Child Welfare: Current Dilemmas, Future Directions 26 (1983).

Moreover, in order to prevent unnecessary removals, this worker must be available from the time the agency begins its investigation. And in order to make reasonable efforts at reunification, continuous casework attention to the needs of the child and family is essential. While these elements are not all-inclusive, they are central to the case before this Court.

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[9] The service mix that each state chooses to fund might also vary; the mix should be related to the needs of families in a particular state. Thus, with regard to the appropriate service mix provided by the states, amici do not disagree with the view expressed by Amici Louisiana, et al., that some aspects of what constitutes reasonable efforts will vary state by state. Brief for Amici States of Louisiana, et al. at 8-9. However, the specific elements at issue in this case are necessary in every state.

B. There Must Be Prompt Assignment of a Caseworker

1. Preventing Unnecessary Removals

Adequate practice requires that agencies assign a caseworker "immediately after a report or referral concerning a child who may be neglected or abused." CWLA, Standards for Child Protective Service, supra p. 23, § 2.7. See also, CWLA, Standards for Own-Home Service, supra p. 23, § 3.1; B. McGowan & W. Meezan, supra p. 24, at 298. It is the duty of the caseworker to determine the nature of the risks facing the child, to determine whether services might reduce those risks, to link the child and family to specific services, and to ensure that the services actually reach the child and family. See J. Kinney, D. Haapala & C. Booth, Keeping Families Together, the Homebuilders Model 23 (1991); B. McGowan & W. Meezan, supra p. 24, at 302. All of these tasks are connected, and none of them can be performed unless the agency assigns a caseworker. Thus, the need for prompt assignment of a caseworker is obvious; unless a caseworker is available, many unnecessary removals will occur.[10]

In conducting the initial investigation, an agency may assign one of its own workers, purchase casework services from a private agency, or develop an alternative method of case management. Moreover, a variety of approaches are appropriate when providing services to prevent removal. Although various approaches operate from different

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[10] This is exactly what happened prior to passage of the AACWA. See supra pp. 8-12.

theoretical models, they are all premised upon the ongoing, active involvement of a caseworker.[11]

The availability of a caseworker also is critical to preventing removal in those situations where a child is left at home following initial investigation. As just indicated, removal often can be prevented by the prompt delivery of services to the parents, for example homemaker services, counseling, or drug treatment. However, many parents need regular support in using these services; they also need a caseworker to ensure that the service actually is provided. This caseworker must begin providing help immediately, since "[s]ocial worker assistance is more likely to succeed where immediate follow-up occurs after a referral." CWLA, Standards for Child Protective Service, supra p. 23, § 2.6. Absent such activities by the caseworker, the home situation may deteriorate, necessitating the child's removal.

2. Facilitating Reunification

When a child is removed from the home and placed in temporary protective custody, prompt action by a caseworker is essential to facilitate reunification. NASW Standards, supra p. 23, Standard 25. Parents are particularly receptive to social work intervention and supportive services at a point of crisis. See J. Kinney, D. Haapala & C. Booth, Reaching High Risk Families 41 (1990). And for children placed in emergency foster care, the agency caseworker is often the only line of connection between parent and child. When there is a delay in the assignment of a caseworker, parents will be unable to

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[11] Because states retain wide discretion in how they choose to exercise the casework function, the concern of Amici Louisiana, et al., that states will lose opportunities to experiment is misplaced. Brief for Amici States of Louisiana, et al. at 8-9. The Solicitor General's concern about a lack of uniformity among theoretical approaches is similarly misconceived. Brief for the United States as Amicus Curiae at 32 n.15.

contact their children, or learn even the most basic information about their children's well-being. Parents discouraged from the outset by their inability to gain information or attempt to plan for their children's return are more likely to approach any subsequent agency efforts at reunification with skepticism. See, e.g., Hess & Folaron, Ambivalences: A Challenge to Permanency for Children, 70 Child Welfare 403 (1991).[12]

A caseworker acting promptly also may be able to locate a relative who will take custody of the child, or who can mobilize extended family members to assist the parent and child, easing the way for prompt reunification. At the same time, the worker is evaluating the risks to the child, developing services to control or eliminate those risks, and working out a plan with the family to facilitate a return of the child to the parent.

If a child is not returned immediately to the parent, the caseworker is also responsible for promptly developing and implementing a visitation plan for child and parent. This, too, facilitates reunification, since there is evidence that visitation between parent and child is a significant predictor of the likelihood of reunification, and that frequency of caseworker contact is associated with greater frequency of visiting. D. Fanshel & E. Shinn, supra p. 8, at 85-110. Visitation also is critical to promoting the child's well-being; it helps to maintain

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[12] In addition to their duties with regard to reunification, caseworkers perform functions essential to protecting the child's physical and emotional well-being. The caseworker helps both children and parents deal more effectively with the feelings of separation and depression which often accompany a child's removal from the home. The caseworker also helps reduce the child's sense of isolation, by enrolling the child in school, obtaining medical care or other treatment, and facilitating visits among separated siblings. Thus, the failure of an agency to assign workers promptly jeopardizes the well-being of the children who are supposedly being helped.

the psychological bond between parent and child and reduces the child's anxiety. NASW Standards, supra p. 23, Standard 25.

C. There Must Be Continuous Assignment of a Caseworker

Continuous availability of a caseworker is essential to implementing the entire structure of the AACWA, in particular to ensuring that the case plan is implemented. See generally CWLA, Standards for Organization and Administration for all Child Welfare Services, supra p. 23; NASW Standards, supra p. 23.

As discussed above, when children are left in their families, the absence of a continuously available caseworker may result in the failure to provide services and, as a consequence, the ultimate removal of the child. When a child is in foster care, continuous casework service is essential to facilitating reunification and preventing foster care drift. For example, a caseworker is needed to arrange transportation, monitor visits, or reschedule visits when conflicts arise. When the case plan calls for counseling, the caseworker must assist by making referrals, providing information to the counselor, and monitoring progress. Any break in the continuity of case coverage brings to a halt the coherent implementation of the case plan. Moreover, the caseworker often represents the only agency point of contact through whom a parent can shape case planning, ask questions, or seek assistance.

In addition, juvenile and family court judges measure a parent's progress in reference to their obligations as set forth in the case plan. It is particularly important that the caseworker update and monitor implementation of the case plan that will be used by the court at the 18-month dispositional review to establish the long-term goal of the case.

42 U.S.C. § 675(5)(C). This can be done adequately only if there is a continuously available caseworker.

No professional standard tolerates gaps in casework coverage. A social worker should be transferred from a case only when necessary, and with sufficient time, planning and preparation to prevent damage to the child and family as much as possible. If a caseworker must leave a case, the Child Welfare League of America advises that the case be staffed jointly by a new and old worker for a brief period of time to ensure continuity. See CWLA, Standards for Own-Home Service, supra p. 23, § 4.33; CWLA, Standards For Foster Family Service, supra p. 23, §§ 2.1, 3.4, 4.27.

CONCLUSION

In sum, the child welfare professions provide clear standards against which courts can measure a state's systemic compliance with the reasonable efforts requirement. The standards established by national organizations and child welfare experts are concrete, comprehensive and consistent. They are the basis for state plans throughout the country. They certainly provide a basis for judicial enforcement of the AACWA's requirements.

As organizations involved with the delivery of services to children in their own homes, in substitute care, and in adoptive homes, amici reaffirm the importance of states' ensuring that reasonable efforts are made to maintain and reunify families. The requirement is at the heart of the national child welfare policy embodied in the AACWA. Abused and neglected children are the most vulnerable people in our society. They deserve, and require, the full implementation of laws enacted to protect them. This will occur only if federal courts enforce these rights.

For the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Seventh Circuit.

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Supreme Court of the United States

OCTOBER TERM, 1991

SUE SUTER, *et al.*,

Petitioners,

—v.—

ARTIST M., *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INTEREST OF *AMICI*[1]

Amici either represent or are comprised of individuals who represent abused and neglected children embroiled in child welfare systems throughout the 50 states. They include membership organizations representing literally thousands of juvenile court practitioners, judges and related professionals (National Association of Counsel for Children and National Legal Aid and Defender Association); child advocacy organizations (American Civil Liberties Union, through its Children's Rights Project; ACLU of Illinois; Mental Health Law Project; and Youth Law Center) litigating to enforce the reasonable efforts and other provisions of the Adoption Assistance and Child Welfare Act of 1980 ("The AACWA"); and the largest provider of direct legal services to juveniles in the United States (The Legal Aid Society of New York).

STATEMENT OF THE CASE

I. The AFDC-Foster Care Program And The Adoption Assistance And Child Welfare Act Of 1980

In 1961, Congress established the Aid to Families with Dependent Children-Foster Care program ("AFDC-FC") as part of the federal AFDC program for needy families with dependent children.[2] Congress structured

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] Act of May 8, 1961, Pub.L. No. 87-31, §2, 75 Stat. 76. *See* 42 U.S.C. §608 (1976)(AFDC-Foster Care program), §§601-606 (1988 & Supp. I 1990)(basic AFDC program). *See also* Pub.L. No. 90-248, §205(a), 81 Stat. 892 (1968)(making AFDC-FC program mandatory for all states participating in basic AFDC program). All citations to the United States Code are to the 1988 & Supp. I 1990 edition, unless otherwise indicated. All citations to the Ill. Rev. Stat. are to the 1989 edition (continued...)

AFDC-FC in the same manner as the basic AFDC program. Benefits were distributed to foster children by the participating states, each of which was required to have in effect (as part of the state AFDC "plan" itself) a foster care program that met certain specified statutory requirements. 42 U.S.C. §§602(a)(20), 608 (1976). In 1979, this Court unanimously recognized the right of foster care children to seek federal court relief to enforce AFDC-FC requirements. *Miller v. Youakim*, 440 U.S. 129, 137-38 (1979).

As the American Association for Protecting Children and other organizations detail in their *amicus* brief ("AAPC Brief"), the AFDC-FC program was a failure. Once removed from their parents, most children were doomed never to be returned home or to attain stable or permanent family relationships.

In 1980, Congress acted to correct these problems, replacing the AFDC-FC program with a new foster care program set forth in Title IV-E of the Social Security Act. Like its predecessor, IV-E utilizes a "state plan" structure. 42 U.S.C. §671. However, Congress explicitly strengthened federal requirements to prevent placement of children in foster care and to reunite children already placed in foster care with their parents:

> In order for a State to be eligible for payments under this part [IV-E], it shall have a plan approved by the Secretary which . . . shall be in effect in all political subdivisions

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[2] (...continued)
unless otherwise indicated. Citations to Pet.Br. are to the Petitioner's Brief. Citations to Op.Cert.App. are to the Appendix to the Brief in Opposition to *Certiorari*. Citations to SG Br. are to the Brief for the United States as *amicus curiae*. Citations to Council Br. are the Brief of the Council of State Governments, *et al.*, as *amici curiae*. Citations to the States' Br. are to the Brief of the States of Louisiana, Alabama, *et al.*, as *amicus curiae*.

> of the State . . . [and which] provides that, in each case, reasonable efforts will be made, (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his own home.

42 U.S.C. §§671(a)(3), (15).

II. The Illinois Child Welfare System

Petitioner Suter is the Director of the Illinois Department of Children and Family Services ("DCFS").[3] In FY 1990, DCFS received approximately $70 million in federal funds to administer its IV-E program. Illinois Department of Children and Family Services, *Financial and Compliance Audit* (1990) at 112.

When a child in Illinois has been judicially determined to be "abused, neglected, or dependent" in his or her parental home, Ill. Rev. Stat. ch. 37 §§802-3, 802-4 (defining these terms), DCFS may be awarded "temporary custody" of the child or the juvenile court may send the child home under a "protective order" setting forth conditions that the parents must observe to keep the child. Op.Cert.App. 11 (Finding No. 4); Ill. Rev. Stat. ch. 37 §§802-25, 802-26. Under a system of DCFS' design, a caseworker is supposed to be assigned to each such child to identify and provide appropriate child welfare services -- including services designed to preserve or reunite the family. Op.Cert.App. 11-13 (Findings Nos. 4-8). Without a caseworker, a child and his family cannot

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[3] Petitioner Gary Morgan is the individual at DCFS appointed by the Illinois juvenile courts to act as guardian for the children in DCFS' care. Collectively, Ms. Suter and Mr. Morgan are referred to herein as "petitioners."

receive foster care prevention and family reunification services. *Id.* at 13 (Finding No. 9).

DCFS has regularly delayed the assignment of cases to caseworkers capable of initiating child welfare services to plaintiffs and their families, both in protective order and temporary custody cases. *Id.* at 15 (Finding No. 13). Because of DCFS' delay, neither foster care prevention services nor family reunification services -- or indeed any services at all -- were provided such children. *Id.* (Findings Nos. 9, 10).

III. This Case

On December 14, 1988, a plaintiff class of children in the "temporary custody" of the State of Illinois or under a "protective order" filed suit against petitioners, alleging that DCFS routinely failed to timely assign them caseworkers in violation of, *inter alia*, the reasonable efforts requirements of the AACWA, 42 U.S.C. §671(a)(15). Plaintiffs moved for a preliminary injunction restraining DCFS' failure to provide them with caseworkers.

At the hearing on plaintiffs' motion, DCFS admitted it did not timely assign caseworkers, but maintained that a "reorganization plan" would remedy the problem. Pet. App. 341; Op.Cert.App. 30 (Stipulation No. 7). The district court postponed ruling on the preliminary injunction motion in order to give DCFS' reorganization plan a chance.

On April 3, 1990, fifteen months after the preliminary injunction hearing, the district court concluded that DCFS' reorganization plan had been a failure and granted the children's motion for a preliminary injunction. (Pet.App. 51a - 58a). The district court rejected plaintiffs' request that caseworkers be assigned within 24 hours. Instead, relying on DCFS' statement that assignment of caseworkers within a three day period "would

not be overly burdensome," *id.* at 54a, it ordered defendants "to assign a caseworker capable of providing child welfare services to each of the plaintiffs and their families within three days of the time that plaintiffs' cases are first heard in Juvenile Court " or within three days of the time "that a previously assigned caseworker relinquishes responsibility for any portion of a case." *Id.* at 56a.

The United States Court of Appeals for the Seventh Circuit affirmed. (Pet.App. 1a, 30a). Petitioners filed a timely petition for *certiorari*, and this Court granted the petition on May 13, 1991.

SUMMARY OF ARGUMENT

The AACWA requires states accepting federal IV-E funds to have a "plan" "in effect" which provides that "in each case, reasonable efforts" will be made to prevent removal of children from their homes and to reunify children with their families once removed. 42 U.S.C. §§671(a)(3), (15). Petitioners do not dispute and the Solicitor General concedes that Congress intended these statutory provisions to create a binding obligation on the states for the benefit of children like these plaintiffs (Pet.Br. at 17, SG Br. at 16-17). The sole questions on which *certiorari* was granted in this case are (1) whether the statutory language on which Congress relied to effect that intent is so vague that enforcement of the right is beyond the competence of the federal judiciary, and (2) whether the reasonable efforts provision applies to children who remain in their own homes.

The principal argument advanced by petitioners and their *amici* is that no §1983 claim can be brought to enforce the AACWA's reasonable efforts clause because that clause is too vague to be construed by the federal judiciary. However, federal courts are well practiced in construing and enforcing reasonableness standards. This

Court has repeatedly so held for half a century, and a great deal of congressional draftsmanship assumes as much, as more than 140 provisions of the United States Code contain the same "reasonable efforts" language claimed to be vague and unenforceable here. Indeed, this Court has readily concluded that §1983 claims can be brought to enforce statutory "reasonableness" standards. *Wilder v. Virginia Hosp. Ass'n*, ___ U.S. ___, 110 S.Ct. 2510 (1990); *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987).

Petitioners and their *amici* recognize that the AACWA's reasonable efforts provision is sufficiently specific to be enforced by either the Secretary of HHS or the state judiciary, but assert with little explanation that it is not sufficiently specific to be enforced by the federal judiciary. There is no logical basis for that assertion. Moreover, the reasonable efforts provision at issue in this case is an especially compelling example of a judicially enforceable reasonableness standard, embedded, as it is, in an extensive and well-articulated set of professional standards.

On the second question presented, petitioners argue that the reasonable efforts requirement does not apply to children who remain in their homes because IV-E funds cannot be utilized to provide services to those children. However, the express language of the statute, and all other available evidence, indicate that this assertion is mistaken.

Petitioners and their *amici* also raise a number of arguments that go well beyond the questions on which *certiorari* was granted. Those arguments should not be considered but, if considered, lack merit.

Petitioners and their *amici* suggest that state court reasonable efforts determinations in individual cases and review of state plans by the Secretary of HHS constitute a comprehensive remedial scheme demonstrating con-

gressional intent to preclude a §1983 remedy. Pet.Br. at 40-42. However, this Court has repeatedly held that the existence of individual state court review does not foreclose §1983 actions, and the state court review at issue in this case is far too limited to meet the requirements for a comprehensive scheme manifesting congressional intent to foreclose reliance on §1983. *Wilder*, 110 S.Ct. at 2525. As to the Secretary's review, this Court has repeatedly held that administrative determinations regarding the propriety of continued funding under a spending clause statute do not "close[ ] the avenue of effective judicial review to those individuals most directly affected by" the statute in question. *Rosado v. Wyman*, 397 U.S. 397, 420 (1970).

Alternatively, petitioners hint in a footnote (Pet.Br. at 19 n.7) that the obligation imposed on states by the statute is merely an obligation to draft a paper "plan" and submit it for review by the Secretary, without imposing any obligation on the states to comply with the plan's statutory requirements.[4] However, the text of the AACWA expressly provides that a state must not only file but also comply with its IV-E plan, and congressional intent to create more than a paper right abounds throughout the AACWA's legislative history.

There being no basis under established law for reversing the decision below, petitioners and their *amici* resort to a series of policy arguments purporting to show that Congress "cannot have intended" to create an enforceable right in enacting the reasonable efforts clause. Whatever petitioners and their *amici* may think of the merits of that clause, this Court has always left policy judgments about the wisdom of creating such rights to Congress.

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[4] The Solicitor General offers similar speculation at the footnote level, (SG Br. at 15 n.6), while the Council of State Governments offers an extended argument on the point (Council Br. at 16-22).

ARGUMENT

I. THE REASONABLE EFFORTS CLAUSE OF THE AACWA IS ENFORCEABLE UNDER 42 U.S.C. SECTION 1983

In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court held that 42 U.S.C. §1983 provides a cause of action against a state defendant for the deprivation of federal statutory rights. That holding applies unless (1) the statute does not create enforceable rights within the meaning of §1983, *see Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1980); or (2) express congressional intent to foreclose §1983 relief can be clearly found. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981). With respect to whether a right enforceable under §1983 exists:

> Such an inquiry turns on whether [(1)] "the provision in question was intended to benefit the putative plaintiff" [citations omitted]. If so, the provision creates an enforceable right unless [(2)] it reflects merely a "congressional preference" for a certain kind of conduct rather than a binding obligation on the governmental unit . . . [citation omitted] . . . or unless [(3)] the interest the plaintiff asserts is "'too vague and amorphous'" such that "'it is beyond the competence of the judiciary to enforce.'"

Wilder, 110 S.Ct. at 2517; *see also Dennis v. Higgins*, ___ U.S. ___, 111 S.Ct. 865, 871-72 (1991); *Golden State Transit Corp. v. City of Los Angeles*, ___ U.S. ___, 110 S.Ct. 444, 448 (1989); *Wright*, 479 U.S. at 431-32.

The first question presented in this case is narrowly drawn. The petition for *certiorari* and the bulk of petitioners' brief do not ask this Court to reexamine any of its decisions defining §1983 jurisprudence. Nor did the petition for *certiorari* include as a question presented

whether Congress intended to foreclose application of §1983 to the AACWA. Petitioners have not denied -- and the Solicitor General has admitted (SG Br. at 16) -- that the reasonable efforts clause was intended to benefit children like these plaintiffs. Petitioners have admitted that the question of whether the reasonable efforts clause creates a "binding obligation" on the states is "a point not at issue in this case," Pet.Br. at 17, and the Solicitor General affirmatively asserts that "the [reasonable efforts] requirement is mandatory, not precatory." SG Br. at 16. These concessions, forced by the text and legislative history of the Act,[5] leave as the first question properly before this Court whether the AACWA's reasonable efforts provision is too vague and amorphous to be judicially enforceable.

A. Enforcement Of The "Reasonable Efforts" Clause Is Not Beyond The Competence Of The Judiciary

This Court strives to construe statutory language to give effect to Congress' intent, not to thwart it. *See Watt v. Alaska*, 451 U.S. 259, 265-67, 270-73 (1981). In determining whether the "reasonable efforts" clause can be enforced by the judiciary, this Court must determine whether Congress was so inept in its draftmanship that it

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[5] The statute is unambiguous in its mandatory import. "In order for a State to be eligible" for IV-E payments, it "*shall* have a plan" consisting of "*requisite* features" which "provides that, *in each case*, reasonable efforts *will* be made." That plan "*shall* be in effect" throughout the state, and federal funds "shall" be cut off or reduced if there is a "substantial failure to comply the provisions of the plan." 42 U.S.C. §§671 (a)(3), (15); 671(b)(emphasis added). The legislative history confirms that the standard of child care spelled out in the AACWA -- including the reasonable efforts clause -- was specifically intended to directly benefit children like these plaintiffs. *See* the AAPC Brief for a complete discussion of the legislative history.

failed to create the right it intended to vest in these plaintiff children.

By arguing, as they do, that the reasonable efforts clause can be enforced by the state courts and by the Secretary of HHS, Pet.Br. at 40-42; SG Br. at 28-33, petitioners and their *amici* necessarily recognize that the reasonable efforts clause has sufficient content to be construed and enforced. The Solicitor General explicitly agrees that the reasonable efforts clause imposes identifiable obligations. SG Br. at 17 n.7. If the clause has sufficient meaning to be administered by state judges and the Secretary, that meaning does not evaporate when scrutinized by an Article III judge.[6]

1. The Judiciary Is Well Accustomed To Applying Reasonableness Standards

The heart of petitioners' position is their contention that the phrase "reasonable efforts" is too vague and amorphous to be capable of judicial enforcement. That phrase, however, is the very grist of judicial decision-making and congressional drafting. Federal courts routinely and necessarily apply the "reasonable efforts" formulation in thousands of statutory (and other) contexts every day.

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[6] Petitioners and their *amici* argue that the states and the Secretary differ from federal judges because they have greater expertise than do the federal courts in assessing the meaning of the reasonable efforts obligation. But, while expertise may help these tribunals deal with the complexity of the reasonable efforts clause, expertise cannot make meaningless language meaningful. This Court has never held that enforcement of a statutory provision is beyond the competency of the judiciary simply because it raises issues that call for particular expertise. Indeed, trial courts have long been well armed to deal with issues calling for specialized knowledge, and the Federal Rules of Civil Procedure and Evidence make specific provision for dealing with such questions. *E.g.*, Fed.R.Civ.P. 53 (special masters); Fed.R.Evid. 702-03 (expert testimony); Fed.R.Evid. 706 (court appointed expert).

Over fifty years ago, this Court rejected the very vagueness argument that petitioners raise here. In *Virginian Railway Co. v. System Federation No. 40, Railway Employees Department of the American Federation of Labor*, 300 U.S. 515, 545, 550 (1937), this Court was asked to find that a statutory provision requiring the exercise of "every reasonable effort" toward compliance with legislative objectives was so vague as to be unenforceable. Writing for the Court, Justice Stone rejected the argument virtually out of hand:

> There is no want of capacity in the court to direct complete performance of the entire obligation . . . Whether an obligation has been discharged, and whether action taken or omitted is in good faith or reasonable are everyday subjects of inquiry by courts in framing and enforcing their decrees.

Id. at 545, 550; *see also Chicago & North Western Ry. Co. v. United Transp. Union*, 402 U.S. 570, 578-79 (1971) (*quoting Virginian Railway*). Nor does *Virginian Railway* stand alone in its recognition that reasonableness standards are judicially enforceable, for this Court has repeatedly acknowledged, imposed, enforced, and construed "reasonable efforts" obligations in a vast array of other contexts ranging from environmental protection to school desegregation to utilities regulation and beyond.[7]

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[7] **Environmental Regulation:** Federal regulations require "every reasonable effort to maintain radiation exposures . . . as low as is reasonably achievable," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 243 n.6 (1984). **Employment Discrimination:** Title VII requires that employers "make reasonable efforts to accommodate" the religious needs of their employees, *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 77 (1977). **Labor Relations:** Carriers are required by the Railway Labor Act to make "reasonable efforts to maintain the public service at all times, even when beset by labor-management controversies," *Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express* (continued...)

Indeed, to conclude that enforcement of the "reasonable efforts" phrase is beyond the competence of the federal judiciary would create an "engine of destruction," *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975), that would wreak havoc in administering not only this Court's precedents, but the United States Code itself. The justiciability of that phrase is a *de facto* cornerstone of much statutory drafting. The phrase "reasonable efforts" appears in more than 140 separate provisions of the United States Code. Like the decisions of this Court cited above, these code provisions cover an immense conceptual expanse, including such issues as the standards governing the dissemination of records, 5 U.S.C. §§552a(e)(6) and (8), 38 U.S.C. §4132(f)(2); the funding of migrant health centers, 42 U.S.C. §245b(f)(7); the duties of various sorts of fiduciaries, 29 U.S.C. §1105; the administration of SBA loans, 15 U.S.C. §636(j)(10)(I)(i); and

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[7] (...continued)
& Station Employees, AFL-CIO, v. Florida East Coast Railway Co., 384 U.S. 238 (1966). **Desegregation**: School boards have "an obligation to exercise every reasonable effort to remedy [desegregation] violation[s]," *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25 n.8 (1971). **Free Commerce**: "A State must make reasonable efforts to avoid restraining the free flow of commerce across its borders," *Maine v. Taylor*, 477 U.S. 131, 147 (1986). **Reproductive Rights**: In enacting abortion legislation, "the State is obligated to make a reasonable effort to limit the effect of its regulations to the period in the trimester during which its health interest will be furthered," *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 434 (1983). **Utilities Regulation**: A utility "may be expected to make all reasonable efforts to minimize billing errors and the resulting customer dissatisfaction and possible injury," *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 18 (1978). **Procedural Due Process**: Federal Rule of Civil Procedure 23(c)(2) "requires that individual notice be sent to all class members who can be identified with reasonable effort," *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 349 (1978); *Eisen v. Carlisle*, 417 U.S. 156, 177 (1974). **Federal Subpoena Power**: A respondent is under a duty to make "all reasonable efforts" to comply with a valid subpoena, *United States v. Ryan*, 402 U.S. 530, 534 (1971).

the administration of government funded scholarships, 20 U.S.C. §4506.[8] What Congress and the courts do routinely turns on the assumption that "reasonable efforts"

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[8] *See also* 5 U.S.C. §552a; 5 U.S.C. §584; 5 U.S.C. §3151; 5 U.S.C. §5564; 5 U.S.C. §8151; 5 U.S.C. §8477; 7 U.S.C. §136d; 7 U.S.C. §950aa-1; 7 U.S.C. §1596; 7 U.S.C. §1926-1; 7 U.S.C. §2001; 7 U.S.C. §3151; 7 U.S.C. §5651; 8 U.S.C. §1252a; 10 U.S.C. §2313; 10 U.S.C. §2421; 10 U.S.C. §2632; 10 U.S.C. §7730; 12 U.S.C. §375a; 12 U.S.C. §1454; 12 U.S.C. §1715e; 12 U.S.C. §1715y; 12 U.S.C. §1715z-1b; 12 U.S.C. §1716b; 12 U.S.C. §1781; 14 U.S.C. §660; 15 U.S.C. §636; 15 U.S.C. §644; 15 U.S.C. §1681e; 15 U.S.C. §1988; 15 U.S.C. §2666; 16 U.S.C. §410cc-22; 16 U.S.C. §410cc-34; 16 U.S.C. §459j-8; 16 U.S.C. §460s-7; 16 U.S.C. §460x-7; 16 U.S.C. §460aa-2; 16 U.S.C. §460gg-6; 16 U.S.C. §544g; 16 U.S.C. §698; 16 U.S.C. §1246; 16 U.S.C. §3822; 17 U.S.C. §108; 17 U.S.C. §405; 18 U.S.C. §1963; 18 U.S.C. §3523; 18 U.S.C. §3573; 18 U.S.C. §3612; 18 U.S.C. §4243; 18 U.S.C. §4246; 19 U.S.C. §2295; 19 U.S.C. §2342; 20 U.S.C. §125; 20 U.S.C. §4506; 25 U.S.C. §3002; 26 U.S.C. §274; 26 U.S.C. §4945; 26 U.S.C. §6103; 26 U.S.C. §6704; 28 U.S.C. §455; 28 U.S.C. Fed.R.Evid. 803; 28 U.S.C. Fed.R.Evid. 804; 29 U.S.C. §108; 29 U.S.C. §171; 29 U.S.C. §174; 29 U.S.C. §1105; 29 U.S.C. §1362; 30 U.S.C. §527; 30 U.S.C. §613; 30 U.S.C. §1511; 31 U.S.C. §3720A; 31 U.S.C. §6503; 33 U.S.C. §597; 33 U.S.C. §931; 33 U.S.C. §1342; 35 U.S.C. §295; 36 U.S.C. §125; 37 U.S.C. §554; 38 U.S.C. §246; 38 U.S.C. §1814; 38 U.S.C. §2021; 38 U.S.C. §3114; 38 U.S.C. §3301; 38 U.S.C. §4132; 41 U.S.C. §254; 42 U.S.C. §254b; 42 U.S.C. §254c; 42 U.S.C. §294f; 42 U.S.C. §300h-7; 42 U.S.C. §300z-5; 42 U.S.C. §300aa-10; 42 U.S.C. §300ff-51; 42 U.S.C. §421; 42 U.S.C. §423; 42 U.S.C. §602; 42 U.S.C. §652; 42 U.S.C. §671; 42 U.S.C. §672; 42 U.S.C. §1382b; 42 U.S.C. §1382c; 42 U.S.C. §1395x; 42 U.S.C. §1395mm; 42 U.S.C. §1396b; 42 U.S.C. §1396r-8; 42 U.S.C. §1396t; 42 U.S.C. §1472; 42 U.S.C. §1584; 42 U.S.C. §1766; 42 U.S.C. §1973ff-2; 42 U.S.C. §1997b; 42 U.S.C. §2000e; 42 U.S.C. §2991b-1; 42 U.S.C. §3027; 42 U.S.C. §3273; 42 U.S.C. §3812; 42 U.S.C. §4651; 42 U.S.C. §7506; 42 U.S.C. §7901; 42 U.S.C. §8781; 42 U.S.C. §9613; 42 U.S.C. §9622; 42 U.S.C. §11112; 42 U.S.C. §11361; 42 U.S.C. §11392; 42 U.S.C. §12705; 42 U.S.C. §12751; 42 U.S.C. §12771; 42 U.S.C. §13021; 42 U.S.C. §13023; 43 U.S.C. §485h; 43 U.S.C. §1845; 44 U.S.C. §2111; 45 U.S.C. §152; 45 U.S.C. §157; 45 U.S.C. §563; 45 U.S.C. §726; 49 U.S.C. App. §1348; 49 U.S.C. App. §2203; 50 U.S.C. §1431; 50 U.S.C. §1433; 50 U.S.C. §1701; 50 U.S.C. App. prec. §1; 50 U.S.C. App. §2402; and 50 U.S.C. App. §2405.

standards and obligations are capable of judicial enforcement.

2. The AACWA's "Reasonable Efforts" Clause Is Particularly Susceptible To Judicial Enforcement Under Section 1983

This Court has "'repeatedly held that the coverage of [§1983] must be broadly construed.'" *Dennis*, 111 S.Ct. at 868; *quoting Golden State*, 110 S.Ct. at 448. The text of §1983 offers no exception to the general rule that "reasonableness" standards are judicially enforceable. Indeed, this Court has readily recognized the availability of §1983 as a means of enforcing statutory reasonableness language in the two instances when it has faced the question. *Wilder*, 110 S.Ct. 2510; *Wright*, 479 U.S. 418 (1987).

Petitioners attempt to distinguish *Wilder* and *Wright* by arguing that in both cases the reasonableness language was measurable against an "objective benchmark." Pet.Br. at 29. That distinction is unavailing. Petitioners and their *amici* have advanced no explanation as to why application of the AACWA's reasonableness standard, unlike the thousands of other reasonableness standards employed by the courts, is inherently beyond the capabilities of the federal judiciary. Nor can they, for the AACWA's reasonable efforts clause can be readily measured against established benchmarks of professional social work standards that provide a clear and well-reasoned description of what constitutes "reasonable efforts" to keep families intact.[9] These written standards --

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[9] *See* Child Welfare League of America, Standards for Child Protective Services (1980); Child Welfare League of America, *Standards for Service to Strengthen and Preserve Families with Children* (1989); Child Welfare League of America, *Standards for Own Home Services* (1984); National Resource Center on Family Based Services, *Family-*
(continued...)

described fully in the AACP Brief -- provide abundant content to the reasonable efforts requirement and reflect a professional consensus on the "reasonable efforts" issues drawn from years of formal studies and practice in the field.[10] Moreover, to call conduct reasonable or unreasonable is always to do so with reference to some standard. Whether the particular benchmark is a standard of professional care, a measure of economic efficiency, the intentions of the parties or simply all of the relevant facts and circumstances, the task has never been an insuperable one for the judiciary.

The best petitioners can do by way of distinguishing this case is to seize upon the latitude left the states under the AACWA to argue that such discretion in choosing the method of compliance makes judicial enforcement of the Act's reasonable efforts provision impossible. Pet.Br. at 32-33. However, *Wilder* rejected virtually an identical argument with respect to the Boren Amendment: "While there may be a range of reasonable rates, there certainly are *some* rates outside that range that no State could ever find to be reasonable and adequate under the Act." 110 S.Ct. at 2523 (emphasis in original). Just because the AACWA's reasonable efforts clause leaves the states with discretion as to the nature

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[9] (...continued)
Centered Social Services: A Model For Child Welfare Agencies (1985). *See generally* National Resource Center on Family Based Services, *Annotated Bibliography on Family-Based Services* (1986)(overview of "reasonable efforts" issues); A. Maluccio & P. Sinanoglu, *Parents of Children in Foster Care: An Annotated Bibliography* (Practitioner's Press 1981)(same).

[10] These standards and the literature also fully support the district court's order in this case. The immediate assignment of a caseworker and the continued intensive intervention of the worker are essential not only in promoting family integrity but also in protecting the health and welfare of the child. *See, e.g.*, Child Welfare League of America, *Standards for Child Protective Services* (1980) at §§2.6, 2.15, 3.5.

of the efforts that will be made to preserve and reunite families does not mean that a state's discretion is unbounded.[11]

II. THE REASONABLE EFFORTS CLAUSE APPLIES TO CHILDREN WHO REMAIN IN THEIR HOMES

As to the second question presented, petitioners contend that since "Congress provide[s] no [IV-E] funding" for foster care prevention on behalf of children who have yet to be removed from their homes, Pet.Br. at 47, the plain language of the reasonable efforts clause relating to such children can be ignored, and no obligation arises to make efforts "to prevent or eliminate the need for removal of the child from his home." 42 U.S.C. §671(a)(15). Contrary to petitioner's assertion, Illinois, like every other state, is entitled to claim federal IV-E reimbursement for the costs of certain foster care prevention efforts. 42 U.S.C. §674(a)(3) -- a IV-E provision -- expressly permits reimbursement of not less than 50 percent of the "total amounts . . . necessary . . . for the proper and efficient administration of the [IV-E] plan." Federal IV-E regulations also permit reimbursement for "administrative expenditures necessary for the proper and efficient administration" of the IV-E plan, including "referral to services" and "case management and

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[11] This reasoning also explains the fallacy in the suggestion advanced by petitioner and the State *amici* that enforcement of the reasonable efforts clause will lead to 50 different federal "rights" to family preservation and reunification services. The "right" created by §671(a)(15) is a right to a state plan that makes efforts in each case which fall within the range of reason. That there may a number of service delivery models which fall within that range merely shows that Congress successfully found wording in §671(a)(15) which permitted the states to tailor their response to their particular circumstances. This does not release the states from their obligation to respond to AACWA's mandate in a reasonable manner.

supervision." 45 C.F.R. §1356.60(c)(2). HHS guidelines expressly provide that administrative expenditures may be claimed under IV-E "regardless of whether the child is actually placed in foster care," ACYF-PA-87-05, and the HHS Grant Appeals Board has so ruled. *In Re Missouri Department of Social Services*, Department of Health and Human Services, Grant Appeals Board, No. 85-209, Decision No. 844 (March 2, 1987) at 6-11 (referring specifically to foster care prevention efforts under §671(a)(15)). The petitioners are simply wrong, therefore, when they assert that IV-E funds are unavailable for children who remain in their own homes.

Moreover, even if Congress were not providing funding for foster care prevention services, the unambiguous terms of the statute make clear that the price of accepting IV-E funds is to make "reasonable efforts" to "prevent or eliminate the need for removal of the child from his home." 42 U.S.C. §671(a)(15). Under *Pennhurst*, that clear directive binds the state so long as it accepts any IV-E funds. 451 U.S. at 15.

III. THE REMAINING ISSUES RAISED BY PETITIONERS AND THEIR *AMICI* ARE NOT PROPERLY BEFORE THIS COURT, SHOULD NOT BE CONSIDERED, AND ARE WITHOUT MERIT

A. Congress Has Not Withdrawn Section 1983 As A Means For Enforcing The Reasonable Efforts Clause

Although they did not raise the issue in their petition for *certiorari*, petitioners argue in their brief that §1983 relief is foreclosed because the AACWA purportedly contains a comprehensive scheme for enforcing the reasonable efforts requirement. Pet.Br. at 40-42. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. at 20. This "comprehensive scheme" is said to consist of state court review of initial efforts

made in individual cases, 42 U.S.C §672(a)(1), and the Secretary's state plan review under 42 U.S.C. §671. Pet.Br. at 40-42.

These provisions, however, do not purport to foreclose §1983 actions. If Congress had intended to foreclose such actions, it would have done so explicitly. Indeed, when Congress enacted similar "state plan" requirements for the Child Care and Development Program, it expressly provided that "[n]othing in this paragraph shall be construed to create a private right of action" under that program. 42 U.S.C. §9858c(c)(4)(B). The absence of similar statutory usage in the AACWA raises a compelling inference that Congress did not intend to foreclose §1983 actions.

Petitioners ask this Court to infer congressional intent to foreclose §1983 actions from provisions that are silent on the issue. However, this Court will "not lightly conclude that Congress intended to preclude reliance on §1983 as a remedy for deprivation of a federally secured right." *Wright*, 479 U.S. at 423-24; *Golden State*, 110 S.Ct. at 449. Petitioners bear the heavy burden of demonstrating that Congress specifically intended that an alternative procedure replace §1983. *Wilder*, 110 S.Ct. at 2523; *Golden State*, 110 S.Ct. at 448. This they cannot do.

Although petitioners place much reliance on the existence of state court review under §672(a)(1), the existence of such review "is hardly a reason to bar an action under §1983, which was adopted to provide a federal remedy for the enforcement of federal rights." *Wright*, 479 U.S. at 429; *see also Wilder*, 110 S.Ct. at 2523; *Golden State*, 110 S.Ct. at 448. Moreover, nothing in the AACWA provides or suggests that §672(a)(1) reviews

are the exclusive judicial means for enforcing federal rights, or that a §1983 remedy has been foreclosed.[12]

The Solicitor General contends that state courts are more competent than federal courts to enforce the reasonable efforts requirement. This special competency is said to arise from the long experience of state courts with "domestic" issues including "custody" disputes. SG Br. at 28-29. However, the AACWA -- which regulates the circumstances under which Congress is prepared to fund state intervention into family life -- has nothing to do with domestic custody disputes between parents. Moreover, this Court has never held that federal courts are less competent to enforce federal rights, or that the mere existence of an alternative tribunal with allegedly superior "competence" is sufficient reason to infer congressional intent to foreclose access to the federal courts under §1983. Congress long ago decided in enacting §1983 that federal rights should be protected by the federal judiciary, and the Solicitor General offers no legal or policy basis to unravel that longstanding congressional determination.

Nor is the Secretary's review of state plans under §671 evidence of specific congressional intent to foreclose §1983 relief. This Court has repeatedly rejected the proposition that review by a federal agency suffices to supplant §1983 as a means of vindicating federally protected rights. *Wilder*, 110 S.Ct. at 2524; *Wright*, 479 U.S. at 428; *Ro*sado, 397 U.S. at 420-23. Petitioners offer no reason to depart from those precedents here.

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[12] Indeed, as *amici* the American Bar Association and the National Council of Juvenile and Family Court Judges demonstrate at length in their brief, the state courts cannot meaningfully complete the §672(a)(1) reviews on which petitioners rely unless the provisions of §671(a)(15) are enforced in federal court.

B. Petitioners' Effort To Define Away The Right To Reasonable Efforts Is Unavailing

In an effort to define away a right that they ultimately cannot deny, petitioners hint in a footnote (Pet Br. at 19 n.7) that the reasonable efforts clause merely creates an obligation to draft a paper "plan" and submit it for review by the Secretary, without imposing any obligation on the states to do the things specifically required by the statute and the plan itself. *See also* SG Br. at 15 n.6. That argument was not advanced in the district court or the court of appeals, and was not among the questions identified in the petition for *certiorari*. It has implications well beyond the AACWA, as numerous federal statutes, including the provisions of the Medicaid Act construed in *Wilder* and the Housing Act in *Wright*, contain similar state plan provisions.[13] A decision that effectively overrules *Wilder* and *Wright* without any consideration of the far-reaching implications of such a ruling would be unwarranted in this case.

Moreover, petitioners' position is contradicted by the plain language of the AACWA and by this Court's decision in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1. Since *Pennhurst*, the scope of a state's obligations under a spending clause statute has been defined by the bargain that the statute offers to states accepting federal funds. Here, the bargain for IV-E funding is that states must formulate and comply with reasonable efforts plans. The AACWA requires that a state "plan" not only be submitted to and be approved by the Secretary but also that the plan be "in effect" throughout the state. 42 U.S.C. §671(a)(3). The Secretary is required to cut off or reduce IV-E funding if he determines that the state has breached this bargain "in

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[13] *See, e.g.*, Food Stamp Act, 7 U.S.C. §§2011 *et seq.*; Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §§5601 *et seq.*; Energy Conservation and Production Act, 42 U.S.C. §§6801 *et seq.*

the administration of the plan" through a "substantial failure to comply with the provisions of the plan." 42 U.S.C. §671(b). *See also* 42 U.S.C. §672(a)(1)(requiring judicial determination that reasonable efforts were made as an initial matter in individual cases). These provisions make clear by their very terms that the obligation placed on the states is not just an obligation to submit plans for HHS review, but also an obligation to actually put those plans into effect. The right that vests in children as a result of these provisions is a right to require that the states honor that obligation.

Additionally, petitioners' contention that the AACWA was intended to impose purely procedural obligations on the states is inconsistent with their own recognition that the statute creates enforceable rights. It also requires this Court to find that Congress intended to invest hundreds of millions of dollars merely to provide children with an unenforceable piece of paper. There is no conceivable justification for the purely formalistic and meaningless obligation that petitioners envision. Finally, the legislative history (reviewed fully in the AAPC Brief) is quite clear that the reasonable efforts clause was passed to substantively change the way in which states intervene in troubled families and not merely to create a written record of the states' aspirations in that regard.

C. This Court's Existing Section 1983 Jurisprudence Should Not Be Abandoned

Unlike petitioners and most of their *amici*, the Council of State Governments suggests that this Court should abandon the test it has repeatedly used to determine when a statutory right enforceable under §1983 arises. *Wilder*, 110 S.Ct. at 2517; *Dennis*, 111 S.Ct. at 871-72; *Golden State*, 110 S.Ct. at 448; *Wright*, 479 U.S. at 431-32. Council Br. at 9-16. Instead of determining whether Congress intended in 1980 to impose mandatory

obligations on the states for the benefit of plaintiffs which courts are competent to enforce, the Council would have this Court decide whether a particular class of plaintiffs had a "right" as that term was understood under the common law of contracts when §1983 was enacted in 1871. That argument, as well, is not properly before this Court and should not be considered, especially since it has not been briefed by the parties and was not presented in the petition for *certiorari*. *See IRS v. FLRA*, 494 U.S. 922 (1990); *Deshaney v. Winnebago Co. Dep't of Soc. Serv.*, 489 U.S. 189, 195 (1989).

The proposed approach, moreover, is nonsensical. No rational purpose would be served by creating a whole new cottage industry in 19th Century common law rights litigation. Indeed, just last Term, in *Dennis v. Higgins*, 111 S.Ct. at 869, this Court rejected the suggestion that the scope of §1983 should be restricted by its historical origins. Clearly, congressional intent to create rights should be determined from the vantage point of 1980, when the AACWA was passed.[14]

The suggestion that beneficiaries of federal funding statutes lack a §1983 cause of action to enforce the statutes' provisions is also flatly inconsistent with at least two dozen decisions by this Court holding that the recipients of benefits under the Social Security Act, of which the AACWA is a part, may enforce the Act's requirements.[15] Indeed, some 16 of these decisions pre-

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[14] Even under the common law of contracts, the plaintiff children still have enforceable rights. Even if the children were seen as third party beneficiaries of a contract between the state and the federal government, contract law at the time the contract was made must govern. Since the contract at issue was first made in 1980, when third party beneficiary rights were clearly established and known to Congress, the plaintiff children have enforceable rights even under this analysis.

[15] The leading cases are *Maine v. Thiboutout*, 448 U.S. 1; and *Rosado* (continued...)

ceded the passage of the AACWA in 1980, including the unanimous ruling in *Miller v. Youakim*, 440 U.S. 125, in which children directly enforced the federal foster care statute that preceded enactment of the AACWA. When Congress enacted the AACWA in 1980, it was entitled to rely on these many decisions. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988); *Director, O.W.C.P. v. Perini North River Ass'n*, 459 U.S. 297, 319-20 (1983). The Council's Brief offers no basis for overturning them.

D. Petitioners' Policy Arguments Are Unfounded

In light of Congress' clearly expressed intent to create a mandatory provision in the reasonable efforts clause which benefits these plaintiffs, and in light of the readily justiciable nature of that provision, it is hardly surprising that petitioners and their *amici* fall back on a series of policy arguments which purport to establish what Congress "must" have meant in enacting the reasonable efforts clause. In addition to lacking any legal foundation, these arguments are without merit.

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[15] (...continued)
v. Wyman 397 U.S. at 405-06, 422-23. Other decisions that uphold the right of public assistance applicants and recipients to enforce "state plan" requirements set forth in the Act (even if sometimes rejecting their interpretation of the particular requirement at issue) include: *Bowen v. Gilliard*, 483 U.S. 587 (1987); *Lukhard v. Reed*, 481 U.S. 368 (1987); *Atkins v. Rivera*, 477 U.S. 154 (1986); *Schweiker v. Hogan*, 457 U.S. 569 (1982); *Herweg v. Ray*, 455 U.S. 265 (1982); *Harris v. McRae*, 448 U.S. 297 (1980); *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980); *Miller v. Youakim*, 440 U.S. 125; *Quern v. Mandley*, 436 U.S. 725 (1978); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Philbrook v. Glodgett*, 421 U.S. 707 (1975); *Van Lare v. Hurley*, 421 U.S. 338 (1975); *Burns v. Alcala*, 420 U.S. 575 (1975); *Shea v. Vialpando*, 461 U.S. 251 (1974); *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973); *Carlson v. Remilland*, 406 U.S. 598 (1972); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Townsend v. Swank*, 404 U.S. 282 (1972); *Engleman v. Amos*, 404 U.S. 23 (1971); *Lewis v. Martin*, 397 U.S. 552 (1970); *Dandridge v. Williams*, 397 U.S. 471 (1970); *King v. Smith*, 392 U.S. 309 (1968).

Petitioners argue, for example, that Congress "could not have intended" to give priority to "reasonable efforts" over the "best interest" of the child. As is demonstrated in the AAPC Brief, there is no tension between these two goals. Indeed, it is difficult to see how it could be "reasonable" to act contrary to a child's best interests. In addition, if there were a divergence between the two interests, the plain language of §671(a)(15) specifically reflects Congress' choice that the "reasonable efforts" standard governs. If petitioners disagree with that policy judgment, they can reject AACWA funding or seek their remedy in Congress. What they cannot do is seek to rewrite the AACWA's provisions in this Court.

The several variations that petitioners play on the federalism theme are equally unpersuasive. They assert that §1983 enforcement of the AACWA means that federal courts will dictate the structure of state child welfare systems; will result in "different federal rights" in different states; and will "choke the very innovation and improvement in child welfare services that was the slated purpose of the AAA." Pet.Br. at 35-36. These concerns are unwarranted.

Nothing in the AACWA dictates the structure of child welfare systems. The statute leaves the states free to structure their own systems in response to local conditions, to experiment with various models of service delivery, and to decide what range of services to offer. As this Court long ago recognized in *Rosado v. Wyman*, 397 U.S. at 422-23, it is "no part of the business" of federal courts to evaluate "the merits or wisdom of any welfare programs," but it is the duty of federal courts "no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use."

To the extent federalism issues are raised in this case, they exist precisely because the AACWA imposes

mandatory obligations on the states. Whether the courts or the Secretary enforce those obligations, the imposition of federal standards on state child welfare systems is an inescapable result of the AACWA's passage, so long as a state continues to accept IV-E funds.

This leaves petitioners' concern that a "boundless" right to "sue a State when[ever a] child . . . believes that the State's efforts have not been reasonable" will lead to a flood of litigation. Pet.Br. at 38. However, the AACWA has been the law of the land for more than a decade, and no such torrent of litigation has ensued. Only a handful of cases are reported invoking the statute, and only a few of them involve the reasonable efforts clause. Moreover, respondents do not claim a "right" to second guess the reasonable professional judgments of caseworkers. In this case, the plaintiff children alleged they had not received any efforts -- let alone reasonable ones -- to preserve their families because Illinois routinely failed to provide troubled children and their families with caseworkers. The district court specifically found that caseworkers were not being assigned to a substantial number of children and that this failure meant that no efforts were taking place to prevent foster care placement or to reunify those children with their families. The decisions of both the district court and the Seventh Circuit are extraordinarily narrow, and hinge on the substantial failure of Illinois to implement its own system for making reasonable efforts. As the Seventh Circuit held:

> [U]nder the current system as structured by DCFS, the assignment of a caseworker is absolutely essential if the DCFS is to make even the first efforts, much less reasonable ones, to maintain the child's family ties, to work toward reunification of the family if appropriate, and to ensure the child's well being. The district court's injunctive relief

> does not dictate the method of assigning caseworkers or interfere with the ability of caseworkers to exercise their own professional judgment on the job. The court is not creating federal rights to beds, monetary assistance, or housing. The injunction merely fulfills the minimal requirement of the AAA that reasonable efforts are made toward the goals of reducing unnecessary foster care placement and family disruption, and it does so through a method designed to maximize DCFS decisionmaking.

Pet.App. at 16a-17a (footnote omitted). This narrow holding, far from permitting plaintiffs or the federal courts to second guess caseworker decisions, merely enables federal judges to determine whether the minimum requirements of federal law have been met. Although a state can go beyond those minimum requirements, and can experiment in the means for meeting its federal obligations, it cannot fail to have structures in place -- whatever those structures may be -- that meet minimum federal requirements. Federal court review to ensure that these minimum requirements are met will not lead to a flood of litigation.

In addition, the statute does not obligate states to guarantee that each individual family will be preserved or reunited. It merely requires states to do what is "reasonable" in this regard. The federal courts have had long experience with such deferential standards in analogous constitutional contexts without any of the adverse consequences that petitioners predict. For example, institutionalized persons are entitled to receive care of a standard consistent with reasonable professional judgment, *see Youngberg v. Romeo*, 457 U.S. 307 (1982), but no avalanche of cases has resulted. Indeed, this deferential recognition that professional judgments may fall within a broad range of reason has had a generally pro-

phylactic effect since *Youngberg*, limiting litigation to those instances where professional norms have been wholly disregarded. There is no reason to believe that recognition of a §1983 action in this case will yield a result that differs markedly from the pattern of litigation that has emerged since *Youngberg*.

CONCLUSION

The judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

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INTEREST OF THE AMICI CURIAE

The Amici include state and local bar associations, child welfare and advocacy groups, legal advocacy organizations, and plaintiffs in other Illinois litigation brought under 42 U.S.C. § 1983 to enforce the Adoption Assistance and Child Welfare Act of 1980 ("the AACWA"). These diverse groups share a concern about the severe and irreparable harm to Illinois children due to Illinois' failure to enable children to remain home, be reunited with their families, or secure other permanent homes. These groups also share the view that judicial enforcement of the AACWA, and in particular, the "reasonable efforts" requirement is necessary to prevent future harm to Illinois children. They file this amici brief with the written consent of the parties.*

1. State and Local Bar Associations.

The Illinois State Bar Association ("ISBA"), founded in 1877, is a voluntary association of 33,000 attorneys committed to the proper and fair administration of justice for all persons in the state of Illinois. The ISBA Standing Committee on Juvenile Justice, established in 1980 and comprised of judges, states' attorneys, public defenders and private attorneys, reviews and recommends legislation and is active in educating the bar and the public in juvenile issues. ISBA President Thomas A. Clancy has declared 1991-1992 to be the "Year of the Child" during which ISBA will focus member and public attention on children's issues.

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* Amici have filed the letters granting consent with the Clerk of this Court.

The Chicago Council of Lawyers is a 1400-member non-profit, public interest bar association whose activities are designed to improve the system of justice. Formed in 1969, the Council is particularly concerned with honest judicial evaluations, high standards for legal ethics, improvement of the criminal justice system, legal services for the poor and fairness and effectiveness of the courts. The Council's Juvenile Law Committee has been active in seeking improvements in juvenile justice in Cook County, Illinois.

2. Child Welfare, Child Advocacy and Other Civic Organizations.

The Child Care Association of Illinois is comprised of 66 voluntary not-for-profit child welfare agencies delivering a full continuum of children's services throughout the State of Illinois, including preventive and reunification services.

Voices for Illinois Children is a statewide child advocacy organization governed by civic, business and community leaders whose mission is to improve the lives of Illinois children. The organization develops and promotes strategies for early intervention, health care, and child welfare programs.

Illinois Action for Children ("IAFC"), founded in 1977, is a statewide, citizen-based child advocacy organization, promoting improvements and change in the child welfare and juvenile court to enable every child to secure a safe, nurturing and permanent family of his or her own.

The Citizen's Committee on the Juvenile Court is a 29-member volunteer panel, appointed by the Chief Judge of the Circuit Court of Cook County, which serves in an

advisory capacity to various judicial and administrative offices in the juvenile justice system.

The Illinois Caucus for Foster Children, Inc. is a state-wide coalition of individuals and organizations, including many foster parents, concerned about the quality of care of more than 23,000 Illinois children currently in foster care.

The League of Women Voters of Illinois is a nonpartisan organization that works to promote political responsibility through the informed and active participation of citizens in government. The League has a long history of advocacy on behalf of children, including support of improved services of Illinois state agencies serving children and their families.

3. **Legal Advocacy Groups.**

Business and Professional People for the Public Interest ("BPI") was founded in 1969 for the purpose of providing representation to groups and individuals whose rights are endangered.

The Chicago Lawyers' Committee for Civil Rights Under Law, Inc. ("Lawyers' Committee") was founded in 1969 for the purpose of involving private attorneys in an effort to assure civil rights to all persons in the Chicago area.

The Mandel Legal Aid Clinic of the University of Chicago Law School represents poor people, including mothers and children, in virtually all federal and state forums in Illinois.

Northwestern University Legal Clinic is an in-house clinic which represents indigent clients in a variety of pro-

ceedings; the clinic's primary focus is on the representation of families and children both in and outside of the Juvenile Court of Cook County.

4. Plaintiff Class Members in *Norman v. Suter*.

The plaintiff class in *Norman v. Suter*, No. 89 C 1624 (N.D. Ill.) includes thousands of Illinois parents whose children were removed from or maintained outside of their custody by the Illinois Department of Children and Family Services ("DCFS") because of their poverty but for whom the agency made no "reasonable efforts" to keep their family together.

SUMMARY OF ARGUMENT

The Adoption Assistance and Child Welfare Act of 1980 ("AACWA"), Pub. L. 96-272, 94 Stat. 501 (1980), codified at 42 U.S.C. §§ 671 *et seq.* restructured the federal foster care program Congress had created as part of Title IV-A of the Social Security Act (the "Act") in 1961. 42 U.S.C. § 608 (1976). The restructured foster care program, Title IV-E of the Act, like the predecessor IV-A foster care program, requires states, as a condition of federal funding for their IV-E foster care programs, to ensure that these programs comply with federal statutory "state plan" requirements. 42 U.S.C. § 671(a). *See Miller v. Youakim*, 459 U.S. 125 (1979). This case concerns the judicial enforceability of a Title IV-E state plan requirement that was central to Congress' efforts to restructure the Act's foster care program, which Congress found seriously deficient and sought to reform.

For states participating in the program, including Illinois, Sections 471(a)(3) and (15) of the Act, 42 U.S.C.

§§ 671(a)(3) and (15) ("Sections 671(a)(3) and (15)"), require that a "state plan" be "in effect" which provides that:

> in each case, reasonable efforts will be made, (A) prior to the placement of a child in foster care to prevent or eliminate the need for removal of a child from the home and (B) to make it possible for the child to return to his own home.

Section 472(a)(1) of the Act, 42 U.S.C. § 672(a)(1) ("Section 672(a)(1)"), also requires, in order for a child to be eligible for federal foster care payments under Title IV-E, that a state court judge must first make a "judicial determination" that the state child welfare agency has made "reasonable efforts" to prevent or eliminate the need to place the child in foster care.

The principal question in this case is whether the direct beneficiaries of the Title IV-E foster care program may judicially enforce, in a federal court suit under 42 U.S.C. § 1983, their right to have "in effect" a "state plan" providing for the "reasonable efforts" that Sections 671(a)(3) and (15) mandate. The court of appeals determined that Sections 671(a)(3) and (15) are judicially enforceable in a Section 1983 suit, and amici here support the many arguments of respondents and their other amici urging affirmance of that judgment. Amici here supplement those arguments by a discussion of the evidence of DCFS' systemic non-compliance with Sections 671(a)(3) and (15) and the effects of such non-compliance on Illinois children and on the Illinois courts.

A. The principal goal of AACWA was to eliminate unnecessary use of foster care. The principal means by which Congress effectuated this goal was to "restructure" the then-existing Aid to Families with Dependent Children—Foster Care ("AFDC-FC") program by requiring states,

as a condition of federal financial participation in Title IV-E foster care programs, to have "in effect" a "state plan" providing in each case for "reasonable efforts" to prevent the need for removal and to make it possible for the child to return home. S. Rep. No. 336, 96th Cong., 1st Sess. 1, 12 (1979).

B. Illinois does not have "in effect" a "state plan" that provides for the "reasonable efforts" mandated by Sections 671(a)(3) and (15). The district court's findings in this case, findings in other litigation, and numerous reports by committees of the organized bar and child welfare experts in Illinois all document this conclusion.

C. The systemic failure of Illinois to have in effect a state plan providing such "reasonable efforts" causes children remaining at home and foster children in Illinois substantial and irreparable injury.

D. Because DCFS has failed to comply with Sections 671(a)(3) and (15), the Illinois state juvenile courts cannot satisfactorily comply with their own independent obligation under Section 672(a)(1): to make an informed judicial determination, before placing an individual child in foster care, that DCFS has made "reasonable efforts" to prevent such a placement.

E. Neither the Illinois state juvenile courts nor the Secretary is capable of effectively enforcing—and they do not in fact enforce—the AACWA requirement that the state welfare agency administering the Title IV-E program put "in effect" a "state plan" that provides in each case for "reasonable efforts" to prevent removal and enable children to return home.

ARGUMENT

I.

THE AACWA REQUIRES ILLINOIS TO HAVE IN EFFECT A STATE PLAN PROVIDING FOR "REASONABLE EFFORTS" TO PREVENT PLACEMENT OF CHILDREN IN FOSTER CARE AND TO ENABLE CHILDREN PLACED IN FOSTER CARE TO RETURN TO THEIR OWN HOMES.

Congress enacted the Adoption Assistance and Child Welfare Act of 1980 ("AACWA"), Pub. L. No. 96-272, 94 Stat. 501, to effect a "major restructuring" of Social Security Act programs for the care of children removed from their own homes. S. Rep. No. 336, 96th Cong., 1st Sess. 1 (1979). One important goal of the new act was to "de-emphasize the use of foster care", *id.* at 12, by increasing prevention efforts and moving children out of foster care by reuniting them with their own families when feasible or placing them in adoptive homes. *Id.* at 10. The statutory emphasis on foster care prevention and family reunification efforts followed the testimony or remarks of numerous witnesses or legislators at several hearings Congress conducted between 1975 and 1979 concerning the nation's child welfare system, particularly as it affected foster children. *Joint Hearings Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare and the Subcomm. on Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975) ("1975 Joint Hearings"); *Hearings on H.R. 7200 Before the Subcomm. on Public Assistance of the Senate Finance Comm.*, 95th Cong., 1st Sess. (1977) ("1977 Senate Hearings"); *Hearings Before the Subcomm. on Public Assistance & Unemployment Compensation of the Comm. on House Ways and Means*, 95th Cong., 1st Sess. (1977); *Hearings on H.R. 3434 Before the Subcomm. on Public Assistance of the Senate Finance Comm.*, 96th Cong., 1st

Sess. (1979) ("1979 Senate Hearings"). These witnesses testified to alarming foster care abuses, including thousands of children placed in foster care and set adrift from placement to placement when minimal efforts might have enabled them to remain or return home. *See, e.g., 1979 Senate Hearings* at 56 (remarks of Sen. Cranston); *1977 Senate Hearings* at 106 (testimony of Secretary Califano); *1975 Joint Hearings* at 10 (testimony of Dr. Albert Solnit); *1975 Joint Hearings* at 75 (testimony of Dr. David Fanshel).

Congress sought to achieve the type of restructuring it desired by requiring states participating in the Title IV-E foster care program to have "in effect" a "state plan" that provided both for efforts to prevent placement of children in foster care ("foster care prevention efforts"), or if placement of a particular child was necessary, efforts to reunite the child with his family ("family reunification efforts"). 42 U.S.C. §§ 671(a)(3) and (15).

In Section 672(a)(1), Congress also provided that before a child can be placed in foster care under the Title IV-E program, there must be a state court judicial determination that "reasonable efforts of the type described in section 671(a)(15) . . . have been made." 42 U.S.C. § 672(a)(1).

In 1974, 1,864 Illinois children were reported to the DCFS as abused or neglected. By 1988, that number had increased to 94,098. Brief of Defendant-Appellant Johnson (DCFS Director) at 18, *Bates v. Johnson*, 901 F.2d 1424 (7th Cir. 1990) (No. 89-3095).[1] Over 20,000 children are

[1] The relevant section of this brief, the relevant sections of the *B.H.* Panel Report, *infra* at 9, the Chicago Bar Association Report, *infra* at 15-16, the *Norman* Consent Decree and Chicago Tribune article concerning it, *infra* p. 13, the relevant DCFS Rule and Procedure Manual sections, *infra* pp. 10, 22, 24, the AFDC Policy

(Footnote continued on following page)

currently in DCFS' custody. Final Consolidated Report of Rule 706 Panel of Experts at 2, *B.H. v. Suter*, 88 C 5599 (N.D. Ill., Oct. 26, 1990) ("Expert Panel Report").[2] These children and children remaining home who are at risk of placement in foster care are the ones for whom an Illinois state plan in compliance with Sections 671(a)(3) and (15) is essential to avoid resort to foster care when initial or continued placement is unnecessary or inappropriate.

II.

DCFS SYSTEMICALLY VIOLATES THE AACWA BY FAILING TO MAKE FOSTER CARE PREVENTION AND FAMILY REUNIFICATION EFFORTS FOR CHILDREN, THEREBY CAUSING THE CHILDREN SUBSTANTIAL AND IRREPARABLE HARM.

Illinois has vested exclusive responsibility for initiating foster care prevention and family reunification efforts in DCFS "follow-up" caseworkers. Op. Cert. App. 11-13 (District Court Findings Nos. 4-8). At the same time, however, Illinois has failed to develop a system of providing timely follow-up caseworker assignments to substantial

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[1] *continued*
Manual sections, *infra* p. 10 and the Mitchell case plan and order, *infra* p. 14, have all been lodged with the Clerk of this Court and served upon the parties to this litigation and Petitioners' amici.

[2] In *B. H. v. Suter*, a class of children in foster care in Illinois has alleged violation of their constitutional rights to minimally adequate treatment as well as violation of several provisions of the AACWA. After denying a motion to dismiss, *B. H. v. Johnson*, 715 F. Supp. 1387 (N.D.Ill. 1989), the district court on August 31, 1990 appointed a panel of experts to review DCFS' treatment of children in ten areas. The panel submitted its 500-page report on October 26, 1990.

numbers of plaintiff children. This systemic failure violates the clear mandate of Sections 671(a)(3) and (15) for a state plan "in effect" providing for "reasonable efforts in each case." As a result, Illinois children suffer in precisely the ways Congress sought to prevent when it enacted the AACWA.[3] Illinois' failure to make the reasonable efforts mandated by Congress is manifest both in the record of the case and the public record established in other matters.

A. The *Artist M.* Record.

Petitioners do not challenge in this Court the district court's findings of fact that accompanied the preliminary injunction order they seek to overturn. These findings of fact tell the story of DCFS' failure to have in effect a plan for the provision of reasonable efforts for a substantial number of children in foster care in Illinois. Op. Cert. App. 4-25.

The district court found, in particular, that "[u]nless and until DCFS has assigned a caseworker [to a child's case], *no* services can be or are in fact provided to plaintiffs

[3] As our fellow amici, the American Association for the Protection of Children *et al.* show in detail, long-term placement in foster care (often in successive foster care placements) for children who could remain at home or promptly return home is harmful to such children, and very costly to the state. A.A.P.C. Br. § II. In Illinois, for example, it costs, per month, at least $263 to maintain a baby in foster care, $325 to care for a teenager and nearly $500 to care for children in emergency foster homes. Illinois Department of Children and Family Services, *Rules and Procedures Manual* App. E-P359(1E) (July 1, 1990). Institutional placement is, of course, substantially more expensive. By contrast, children at home receiving Aid to Families with Dependent Children ("AFDC") benefits under Title IV-A of the Act in Illinois received no more than $102 per child per month. Illinois Department of Public Aid, *AFDC Policy Manual* PR 615, Attachment I(2) (January 1, 1991).

or their families." *Id.* at 13 (Findings Nos. 9, 11) (emphasis added). Accompanying that central finding were numerous additional findings attesting to: "significant delays . . . in assigning caseworkers at the outset of cases," *id.* at 19 (Finding No. 21); "gaps [in assignment of caseworkers] created when caseworkers resigned, transferred, were fired or took a leave of absence," *id.* at 24 (Finding No. 26); "paper assignments . . . [of] a caseworker in name only," *id.* at 17 (Finding No. 19); no effort "to expedite the assignment of caseworkers capable of delivering family preservation, family reunification and other services to children and their families," *id.* at 17 (Finding No. 18); substantial "harm . . . befalls children for whom such services are not promptly provided, including the continued indefinite separation from their families, *id.* at 14 (Finding No. 10).[4]

Since the service delivery system DCFS itself has established requires the assignment of caseworkers to a case for *any* services to be provided to the children for whom that case was established, and since the unchallenged fact is that many cases are not assigned to *any* caseworker for weeks or even months, *id.* at 15 (Finding No. 13), it necessarily follows that, as the district court found, Illinois children go for extended periods without *any* efforts—much less reasonable ones—to prevent foster care placement and reunite families that Congress intended be made on their behalf. 42 U.S.C. §§ 671(a)(3) and (15). *See* Op. Cert. App. 4-25 (Findings Nos. 9, 10, 13, 15, 16).

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[4] The Petitioners argue here, as they did in the lower courts, that DCFS independently took significant steps under a "Reorganization Plan" to expedite case assignment. Pet. Br. pp. 5-6. The district court found otherwise. Pet. App. 51a-58a (Preliminary Injunction Order, March 2, 1990).

B. *Norman v. Johnson*.

Norman v. Johnson, 739 F. Supp. 1182 (N.D. Ill. 1990), is another federal class action suit brought pursuant to 42 U.S.C. § 1983. Like *Artist M.*, the *Norman* findings also demonstrate DCFS' systemic failure to provide foster care prevention and family reunification efforts on behalf of children eligible for them.

Plaintiffs in *Norman* were a class of homeless and other impoverished parents who sued the DCFS director to secure their rights under Section 671(a)(15). *Norman*, 739 F. Supp. at 1182. They alleged, in particular, that far from providing the "reasonable efforts" that AACWA anticipated, DCFS had established a "Catch 22" policy, applied throughout the state to class members and their children, that made it difficult or impossible for foster children taken from homeless or other impoverished parents ever to be reunited with their parents. *Id.* at 1194 (Finding No. 9). Under the challenged policy, DCFS would take children from their parental home because the parents were homeless or too poor to provide "adequate" shelter for them. *Id.* at 1194 (Finding No. 7). In order to have children returned home, however, the parents would need to secure housing and other subsistence first. *Id.* (Finding No. 9). The family, however, could not meet this condition because they would not qualify for the cash and housing assistance they needed in order to afford such housing until the children were actually returned home. *Id.* at 1194 (Finding No. 9). The district court denied the Director's motion to dismiss, finding 42 U.S.C. § 671(a)(15) judicially enforceable.

Contrary to the Petitioners' representation, Pet. Br. at 38, *Norman* did *not* raise claims having to do with the state's failure to make "reasonable efforts" in purely

"individual cases." The injunction the named plaintiffs secured was predicated on the claim of the plaintiff class that DCFS had established a *system-wide* policy that transgressed its obligation to have "in effect" a state plan providing "reasonable efforts" to reunite their families.[5] Most relevant here, the district court's ruling was predicated on several findings of fact, entered after five days of hearings before a magistrate, including: 1) The DCFS investigators (i.e. the persons authorized to remove children from their homes) are not trained as to services that may be available and do not in practice make an assessment of whether there are services available that would avoid the need to remove the children from their parents. *Id.* at 1193 (Finding No. 4). 2) If a report (of abuse or neglect) is found to be based on credible evidence, it takes DCFS "two to three weeks" before a follow-up caseworker is assigned. *Id.* at 1193 (Finding No. 6). These findings establish that, in many cases where the causes for removal of children could be remedied and children returned home quickly, no trained person is available promptly to work with the child and family. The long-term effect of this failure can be devastating for children.

Joann Mitchell, one of the named plaintiffs in *Norman*, suffered the combined effects of the state's failure to ensure that caseworkers are assigned on a prompt and continuous basis—the subject of the children's challenge in

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[5] Following the injunction, DCFS settled *Norman* by establishing extensive "reasonable efforts" policies and a broad-based assistance program for thousands of impoverished families. Consent Decree, 89 C 1624 (Hart, J., March 28, 1991). After settlement, the Director acknowledged that as many as 2500 Illinois families per year could avert placement or be reunited as a result of the agreement. Rob Karwath, "State Agency Hit With Suit," *Chicago Tribune*, Feb. 28, 1989 at 2.

this case—and the "Catch 22" treatment of impoverished families, which was the subject of *Norman*. DCFS took temporary custody of her three children (Nicole, age 11, Christian, age 10, and Dominick, age 5) in 1985 based on an informant's report—which the district court later found may have been false—that she had abandoned the children. *Id.* at 1200. (Finding 57). Ms. Mitchell made repeated inquiries to DCFS regarding her children's whereabouts in the weeks after they were removed. Nonetheless, it took her seven weeks to determine that they had been placed in foster care. *Id.* (Finding 60). The *Norman* record offers no evidence that DCFS made any efforts during this period to reunify the Mitchell family, much less that DCFS had sought to keep the Mitchell children with their mother in the first instance. *Id.* at 1201 (Findings 62-69). The state juvenile court did order the Mitchell children returned to their mother in 1986, but no DCFS caseworker took any action to comply with that order. *Id.* at 1201 (Finding No. 61). Thereafter, DCFS regained temporary legal custody of the children, but offered no services to make possible family reunification. In December, 1988, Christian, then eight years old, was abused in the foster home in which he had been placed. *Id.* at 1202 (Finding No. 71). Nonetheless, only in June, 1989, after the federal district court entered the injunction in *Norman*, did DCFS caseworkers take any steps to provide services to the Mitchell family to make possible the reunification of mother and children. Joann Mitchell, Client Service Plan (June 20, 1990). DCFS finally returned the Mitchell children to their mother under an "Order of Protective Supervision" on November 21, 1990. *In re Mitchell*, No. 86 J 7356-8, Order (Ill. Cir. Ct., Nov. 21, 1990). The children had been in foster care for five years. Timely and continuous assignment of a caseworker to the Mitchell family, coupled with the provision of preventative and

reunification services to the family, might have prevented precisely the type of destructive results Congress sought to prevent when it enacted the AACWA: the protracted separation of children from their mothers, the children's unnecessary placement in foster care, and (in the case of Christian) abuse in the foster care placement.

C. The Expert Panel Report In *B.H. v. Suter* And The Chicago Bar Association Report.

The October, 1990 Expert Panel Report in *B.H. v. Suter* found that DCFS' failure to "develop comprehensive individualized service plans for wards and their families contributes to foster care drift, failed placements and a failure to provide permanency for children." *B.H.* Panel Report at 11. The report noted that cases are "unattended and unassigned." *Id.* at 3. The report further documented that fewer than 50% of families with "founded" abuse or neglect reports receive *any* services to prevent placement of their children. *Id.* at 11. The long-term effect of these state defaults is that DCFS cannot move children into adoptive homes, since the lack of family assessments cripples the state's ability to free and place chiidren for adoption. *Id.* at App. J p. 8; *see also* discussion *infra* pp. 23-24.

Other evidence of the systemic failure to maintain a state plan for "reasonable efforts" appears in the 1989 report of the Chicago Bar Association's Special Committee to Study Juvenile Justice. Chicago Bar Association, *A Report to the President of the Chicago Bar Association* (1989) ("CBA Report"). This report, prepared by a broad-based group of lawyers, court administrators and social service agency directors after a year-long study, advanced numerous recommendations respecting the juvenile court system in Illinois. Notably, it recommended improved implementation of the "reasonable efforts" mandate by:

legal advocacy in juvenile court to enable troubled families to obtain services before their children are removed, identification of services which can prevent foster care placement but are often unavailable or underutilized, and legislative advocacy for additional funding for prevention and reunification services. These recommendations followed from the findings of the Report that the Illinois statute governing prevention and reunification efforts in Illinois is "largely ignored." *Id.* at 12. The Report also noted that DCFS' investigators do not view their function as offering services to families.[6] *Id.*

D. Children In Illinois Are Suffering Substantial And Irreparable Harm Due To Unnecessary Placement In Foster Care.

Our fellow amici, the American Association for the Protection of Children *et al.*, have documented the harm that befalls children in need of foster care prevention and family reunification services when those services are not provided. A.A.P.C. Br. § II. This harm—the harm that results from unnecessary and multiple foster care placements—is severe and irreparable. *Id.* Moreover, contrary to the Director's remarkable suggestion, the principle that foster care prevention and family reunification efforts should therefore be provided to children in need of them is not simply "one theory" among many as to appropriate foster

[6] The Report lamented the "high [financial] cost" of DCFS' failure to adequately ensure the delivery of the same services in compliance with the AACWA, referring to the significant differential between the cost to the state of caring for a child in foster care and helping support him if he remains in his own home. *CBA Report* at 13. *See* note 2 *supra*. Moreover, the Report stated, "there is the intangible cost of rupturing families that should be maintained." *CBA Report* at 13.

care policy. Pet. Br. at 21-25. *No* reputable child welfare professional and no state child welfare program administrator in the entire country disputes the importance of ensuring the systemic provision of such services if the country's foster care policy is to be humane, efficient, and economical. A.A.P.C. Br. at § II.

The harm to children that results from systemic failure to provide foster care prevention and family reunification efforts is documented with respect to Illinois foster children in particular. The Chapin Hall Center for Children at the University of Chicago, a national research center on children's policy issues, has conducted extensive research concerning children in the Illinois child welfare system. A recent study conducted under the Center's auspices demonstrates that the failure to make prompt reunification efforts *within the first weeks* of a child's placement in foster care, coupled with multiple foster care placements for the child in the initial months, substantially diminish the likelihood that the child will *ever* be reunited with his natural family. Robert M. Goerge, "The Reunification Process in Substitute Care," 64 *Soc. Serv. Rev.* 422 (Sept. 1990).

The Expert Panel Report in *B.H. v. Suter* offers further detailed evidence of the harm that befalls foster children in Illinois as a result of the state's failure to effectively implement a plan for the delivery of foster care prevention and family reunification services. In particular, the Report finds that over 80% of the youth in the DCFS shelter care system in Cook County, and the majority of all children in DCFS custody, have been in multiple out-of-home placements. *B.H.* Panel Report, App. D at 6, 12. Children are subjected to multiple short-term placements because of a shortage of out-of-home placement resources to meet their needs. *Id.*, App. D at 12. Such multiple

placements leave children with lasting emotional and developmental scars. *See* A.A.P.C. Br. at § II.

The court in *In re Ashley K.*, 212 Ill. App. 3d 849, 571 N.E.2d 905 (1st Dist. 1991), has also recently concluded that children in the Illinois foster care system routinely are denied the permanent placements Congress intended them to have. That court issued a scathing indictment of the Illinois child welfare system, noting repeatedly Illinois' failure to meet the requirements of the AACWA for the timely disposition of abused and neglected children's cases before the juvenile court:

> Ashley's story is the account of a helpless child caught in the quagmire of the bureaucratic maze which we mistakenly call our welfare system. . . There is no doubt that the DCFS and our juvenile court system are abysmal failures. There are reports that almost as many children are harmed as are benefitted by coming under their aegis.[7]

212 Ill. App. 3d at 873, 571 N.E.2d at 919.

In sum, the Illinois child welfare system today is one in which children drift from temporary placement to temporary placement, when minimal efforts would have enabled them to remain or return home or be freed for

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[7] Since Ashley's case concerned a challenge to the reunification of a family ordered by the trial court after a five-year delay, petitioners here improperly read the case as excusing reasonable efforts *ab initio*. Pet. Br. at 25-26. Far from excusing those efforts, however, the case dramatizes the effect on children in *delaying* reunification efforts as the child forms other attachments. Had the state maintained a system providing for reasonable efforts in a timely manner, and had it documented the parents' failure to cooperate in those efforts, Ashley might have become adoptable (as had been misleadingly promised to her foster parents). *See In re Ashley K.*, 212 Ill. App. 3d at 861, 571 N.E.2d at 907.

adoption. In enacting AACWA, Congress disapproved of just such a system, and through Sections 671(a)(3) and (15), among other provisions, sought to reform it.

III.

DCFS' SYSTEMIC FAILURE TO MAKE FOSTER CARE PREVENTION AND FAMILY REUNIFICATION EFFORTS FOR CHILDREN UNDER A LAWFUL STATE PLAN THAT IS "IN EFFECT" DEFEATS THE ABILITY OF THE ILLINOIS STATE COURTS TO FULFILL THEIR OWN INDEPENDENT OBLIGATION UNDER THE AACWA.

Petitioners acknowledge the mandatory nature of Sections 671(a)(3) and (15), but argue that the provisions of Section 672(a)(2) make the state courts the sole judicial officers authorized to interpret "reasonable efforts."

The obligation arising under Sections 671(a)(3) and (15), is distinct from that arising under Section 672(a)(1). The right secured by Sections 671(a)(3) and (15) is the right to enforce through Section 1983 the Act's requirement "that the state implement a *plan* that provides for reasonable efforts directed at preventing the removal of a child from home, or if the child is removed, to return the child to his family." Pet. App., at 11a (emphasis added). Hence the statute only vests in children a right to have the state comply with this requirement.[8] In contrast, Sec-

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[8] In our view, accordingly, if a child has not received any family reunification services in a particular instance due to a caseworker's error that is unrelated to the efficacy of the state's plan, Section 671(a)(15) is not implicated. There is no federally enforceable right under Section 671(a)(15) to challenge an agency decision to provide or not to provide a *particular* foster care prevention or family reunification service in an *individual* case, absent a claim that the failure to provide such service (or particular services) is the

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tion 672(a)(1) secures a federal right to an individualized state court judicial determination, prior to placement of an *individual* child in foster care, that the state has made "reasonable efforts" to prevent such placement in his or her case.

The distinct federal rights secured by Sections 671(a)(3) and (15) and Section 672(a)(1) are complementary, however. As the American Bar Association, in its amicus brief supporting respondents, explains, without the state's implementation of a "state plan" that complies with Sections 671(a)(3) and (15), state courts cannot fulfill their independent responsibility under Section 672(a)(1) to provide the state judicial oversight of the prevention and reunification efforts in individual cases. *See* ABA Br. at § I. Illinois offers a paradigmatic illustration of this central point, which contradicts the Petitioners' mystifying suggestion, Pet. Br. at 24, that by enacting Section 672(a)(1), Congress indicated it did *not* intend Sections 671(a)(3) and (15) to be judicially enforceable.

In 1985, the Illinois legislature amended the Illinois Juvenile Court Act to incorporate into state law the same right that Section 672(a)(1) confers. Ill. Rev. Stat. ch. 37, § 703-6 (recodified by P.A. 85-601 as Ill. Rev. Stat. ch. 37 § 802-10, effective January 1, 1988). As amended, the

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[8] *continued*
result of an agency failure to have "in effect" a lawful state plan that complies with the AACWA. Sections 671(a)(3) and (15) thus anticipate only systemic challenges to agency policy and practice, not challenges to a caseworker's exercise of her discretion under a lawful state plan that is "in effect." This understanding of the statute decisively rebuts petitioners' contention (Pet. Br. at 38), flawed on numerous grounds, that declaring Section 671(a)(15) to be judicially enforceable will create a torrent of litigation under the provision.

Juvenile Court Act provides for the state court judicial determination of whether "reasonable efforts" have been made to prevent foster care placement in an individual case at the initial "shelter care hearing." This hearing must be held, pursuant to Ill. Rev. Stat. ch. 37, § 802-10, within 48 hours of any removal of a child from his home by an authorized person. The Juvenile Court Act provides specifically that:

> [t]he Court shall require documentation by representatives of the Department of Children and Family Services or the probation department as to the *reasonable efforts* that were made to prevent or eliminate the necessity of removal of the minor from his or her home, and shall consider the testimony of any person as to those *reasonable efforts*. If the court finds that it is a matter of immediate and urgent necessity . . . that the minor be placed in a shelter care facility and further finds that *reasonable efforts* have been made or good cause has been shown why *reasonable efforts* cannot prevent or eliminate the necessity of removal of the minor from his or her home, the court may prescribe shelter care. . . .

Ill. Rev. Stat. ch. 37, § 802-10 (1987) (emphasis added).

DCFS' systemic failure to assign caseworkers to children promptly after the children are removed from their own homes—the failure that this case was brought to correct—makes it *impossible* for a state court judge faithfully to discharge his or her doubly-mandated responsibility under Section 672(a)(1) and Ill. Rev. Stat. ch. 37, § 802-10.

Illinois relies on caseworkers to provide reasonable efforts. Op. Cert. App. 13 (Finding Nos. 9, 11). It also relies on those same assigned caseworkers to testify in juvenile court about the child's needs, the services that have been provided and the efforts that could be made to prevent placement or reunite the family. Ill. Rev. Stat. ch. 37,

§ 802-10; *DCFS Rules and Procedures Manual* at App. E-P305 (1) (Oct. 1, 1986). When no caseworker is assigned at the time of the shelter care hearing to provide reasonable efforts, *no* services at all can be provided, and the juvenile court can receive no informed testimony about the efforts that have been made. This compromises the juvenile court's ability to safeguard against unnecessary foster care placement. With no caseworker present in court, the juvenile court is unable to determine what alternative services might be successful in preventing the need to remove the child, and whether any "reasonable efforts" have been or could be made to prevent placement or reunite the family.

Following the shelter care hearing, the juvenile court waits for weeks, often months, until an assigned caseworker with knowledge about the child's needs appears to testify in court. Under the Illinois Juvenile Court Act, however, the subsequent adjudicatory hearing, to be held one hundred and twenty days after the shelter care hearing, Ill. Rev. Stat. ch. 37, § 802-14, does not explicitly require a "reasonable efforts" determination (even though this subsequent hearing may present the first opportunity for more informed review of whether "reasonable efforts" have ever been made). When several months have elapsed following the shelter care hearing before an assigned caseworker testifies in court, the juvenile court has lost the ability to provide the intended safeguard against unnecessary foster care.

Because DCFS has failed to put "into effect" a "state plan" that provides for "reasonable [foster care prevention] efforts," the Illinois juvenile courts are presented, at the initial shelter care hearing, with a choice between two alternatives, neither of which is consonant with the goals Congress sought to achieve under the AACWA.

First, the state court may return a child home, even though doing so may leave the child at risk of continuing harm. Alternatively, the court may place the child in foster care, even though the child would be better off with parents and siblings if the state made "reasonable efforts" to keep the family together.

The CBA Special Juvenile Justice Committee noted the dilemma the Illinois state juvenile courts face as follows:

> [L]ittle inquiry is made regarding reasonable efforts before cases are filed and children are removed from their parents. . . . The judges are placed in a 'catch-22' when they are told that a child is in danger and DCFS does not have the services needed to leave the child at home safely. The judge faces the choice of allowing the child to return home without the protective services guaranteed by law or removing the child even though adequate services would obviate the need for removal.

CBA Report at 12-13.

DCFS' failure to make reasonable efforts promptly after securing custody of children has serious consequences for children later in need of adoption. In several reported decisions, DCFS' failure to make efforts to preserve families has been held later to bar termination of parental rights (a prerequisite for adoption). *See, e.g., Paul v. Steele*, 101 Ill. 2d 345, 461 N.E.2d 983 (1983) (termination of parental rights reversed because DCFS had discouraged or frustrated promotion of the parent-child relationship); *In Interest of Wheat*, 68 Ill. App. 3d 471, 386 N.E. 2d 278 (1st Dist. 1979); *Taylor v. Taylor*, 30 Ill. App. 3d 906, 334 N.E.2d 194 (1st Dist. 1975); *In re Overton*, 21 Ill. App. 3d 1014, 316 N.E.2d 201 (2d Dist. 1974). As a result, many children in Illinois remain in long-term foster care because the state's attorney (who would otherwise

file a petition to terminate parental rights), the court, or the current DCFS worker concludes that DCFS has not adequately tried to help reunite the family. *DCFS Rules and Procedures Manual* § C-R 302.300 (1987). The state may then operate under a delayed directive to work toward family reunification, and, as a result, cases of children in limbo, torn between attachment to natural parents and foster parents, like Ashley K., come to be commonplace.

IV.

NEITHER THE ILLINOIS STATE COURTS NOR THE SECRETARY OF HHS IS CAPABLE OF SECURING THE CHILDREN'S RIGHT UNDER THE AACWA TO A STATE PLAN UNDER WHICH DCFS WILL MAKE "REASONABLE EFFORTS" TO PREVENT FOSTER CARE PLACEMENT AND ENABLE CHILDREN TO RETURN HOME.

Not only is Illinois unable to provide effective judicial safeguards against unnecessary foster care placements unless Illinois first complies with Sections 671(a)(3) and (15), but Illinois law does not confer upon the Illinois state juvenile courts a means of remedying DCFS' "reasonable efforts" default.

Juvenile courts cannot simply dismiss the state's petitions for custody of children and return children home, despite lack of reasonable efforts, because the interests of children often preclude returning them home to parents who may, without foster care prevention or reunification efforts, continue to neglect or abuse them. *See, e.g, In re J.J.*, 142 Ill. 2d 1, 566 N.E.2d 1345 (1991).[9] The Illinois

[9] Illinois law requires placement decisions following findings of parental abuse or neglect be made consistently with the "best interests" of the child. *See In Re Ashley K.*, 212 Ill. App. 3d 849,

(Footnote continued on following page)

Juvenile Court Act also limits the authority of juvenile court judges to order state executive agencies to amend their policies or practices. *See In re Washington*, 65 Ill. 2d 391, 359 N.E.2d 133 (1976) (injunctions against solitary confinement practice of Department of Corrections and directing establishment of guidelines for discipline methods is unauthorized as beyond the scope of the Juvenile Court Act); *In re Petition of Owen*, 54 Ill. 2d 104, 295 N.E.2d 455 (1973) (same). Furthermore, an individual juvenile court judge sitting in an individual proceeding cannot provide relief to other children not before the court. *See Lyons v. Illinois Dept. of Revenue*, 116 Ill. App. 3d 1072, 452 N.E. 2d 830 (1st Dist. 1983). Thus, an Illinois juvenile court judge, in an individual case in which a child has been taken from his family even though minimal "reasonable efforts" might have kept the family together, cannot order DCFS to make systemic changes in either its state IV-E plan or its manner of implementing that plan. In short, the juvenile court cannot, in such a case, direct the type of systemic relief that would secure the right to have "in effect" the lawful plan mandated by Sections 671(a)(3) and (15).

Nor, contrary to the view of the United States, is the Secretary of HHS capable of securing this right by "fed-

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[9] *continued*

571 N.E.2d 905 (1st Dist. 1991). Contrary to the Petitioners' suggestion, Pet. Br. pp. 21-26, however, there is no inconsistency between this standard and the companion statutory policy that favors keeping children in their own homes and returning them to their homes if they have been placed in foster care. *See* Ill. Rev. Stat. ch. 37 § 801-2(3); *see, e.g., In re Polovchak*, 97 Ill. 2d 212, 454 N.E. 2d 258 (1983). *See also In re Custody of Townsend*, 86 Ill. 2d 502, 427 N.E.2d 1231 (1981) (parental rights . . . "are fundamental and as ancient as mankind"). The latter policy is to be pursued so long as doing so is consistent with the child's "best interests."

eral administrative[ ] enforce[ment]." *See* U.S. Br. at 17 and n. 7. The size, scope and complexity of the public assistance programs the Secretary is charged with overseeing nationally—the AFDC, Medicaid and Supplemental Security Income programs among them—simply defeat any notion that he can possibly police effectively DCFS' compliance with one small, if very important, corner of its Title IV-E program.

Indeed, to the extent that HHS takes it upon itself to review compliance with Sections 671(a)(3) and (15) at all, the federal regulations anticipate only the most limited sort of "paper review," with no attention paid to what the state agency is actually doing. *See* 45 C.F.R. §§ 1356.21(b), (d)(4), 1357.15(e) (1990); United States Dep't of Health and Human Serv., *Policy Announcement* ACYF-PA-84-1 (1984). As the American Bar Association explains more fully in its amicus brief, HHS does not, in any event, qualitatively review whether state child welfare agencies are actually making the "reasonable" foster care prevention and family reunification efforts mandated by 42 U.S.C. § 671(a)(15). ABA Br. at § III.[10]

The Secretary's ability to secure compliance with the "reasonable efforts" requirement of Sections 671(a)(3) and (15), even if it were to conduct a qualitative review and find the state in default, is doubtful. This is because, as

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[10] In Illinois, HHS has not conducted any such reviews notwithstanding the evidence in this case that the state's IV-E plan systemically fails to provide "reasonable efforts" to many children eligible for them, and the evidence in *Norman* and in the independent study reports that "reasonable efforts" findings by state court judges under Ill. Rev. Stat. ch. 37 § 802-10 and 42 U.S.C. § 672(a)(1) are being made "pro-forma," without any actual inquiry into whether such efforts in fact are being made. *Norman*, 739 F. Supp. at 1203.

the United States acknowledges, U.S. Br. at 17, the Secretary has only one crude weapon to enforce these provisions: withholding federal funds under the IV-E program. 42 U.S.C. § 671(b). Use of this sanction would penalize the beneficiaries of the foster care program, without bringing about any programmatic change, and it is therefore understandable why the Secretary has been loathe to invoke it. Indeed, to Amici's knowledge, neither the Secretary nor his predecessors have ever terminated federal funding (other than "incentive payments") to a state-administered public assistance program under *any* portion of the Social Security Act, notwithstanding countless judicial findings of substantial state violations in the administration of these programs. To the contrary, the Secretary has routinely approved state plans later found to be out-of-compliance with that Act. *See e.g. Townsend v. Swank*, 404 U.S. 282, 286-88 (1972).

CONCLUSION

Illinois has failed to put in effect a state plan providing for reasonable efforts to prevent removal of children or enable children to return home, in violation of Sections 671(a)(3) and (15). That failure has resulted in a foster care system in Illinois very much like the one Congress sought to eliminate when it enacted AACWA: a system in which children drift from one temporary foster care placement to another, when minimal "reasonable efforts" would have enabled them to remain at home or to return home. The same failure has frustrated the Illinois state courts' efforts to adhere to *their* obligations under Section 672(a)(1) and state law—obligations that are entirely distinct from the obligation of DCFS under Sections 671(a)(3) and (15). Neither the Illinois state courts nor the Secretary is, in any event, capable of ensuring DCFS' compliance with

the "reasonable efforts" mandate of Sections 671(a)(3) and (15). Judicial enforcement under Section 1983 provides the only effective remedy against the unnecessary—and traumatic—placement of children in foster care that routinely occurs in the absence of a lawful state IV-E plan for "reasonable efforts" that is "in effect". This Court should affirm the court of appeals' judgment.

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In The

Supreme Court of the United States

October Term, 1991

SUE SUTER, et al.,

Petitioners,

v.

ARTIST M., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' SUPPLEMENTAL MEMORANDUM REGARDING NEW SUPPORTING AUTHORITY

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RESPONDENTS' SUPPLEMENTAL MEMORANDUM REGARDING NEW SUPPORTING AUTHORITY

The Court of Appeals for the Third Circuit recently provided additional evidence that enforcement of the reasonable efforts requirement will not cause any substantial increase in child welfare litigation in the federal courts. In *Winston v. Children and Youth Services of Delaware County*, No. 90-1788 (3d Cir. November 7, 1991),[1] the Court of Appeals rejected a challenge based on the reasonable efforts requirement to Pennsylvania's policies

[1] A copy of the *Winston* opinion has been lodged with the Clerk of the Supreme Court.

and practices regarding visitation for parents whose children had been placed in the State's custody.[2]

In assessing the merits of the plaintiffs' claim, the Court of Appeals in *Winston* first applied the three-prong test set forth by this Court in *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444 (1989), and *Wilder v. Virginia Hospital Association*, 110 S. Ct. 2510 (1990), and confirmed that the reasonable efforts requirement creates enforceable rights under 42 U.S.C. § 1983. Consistent with the decisions of the District Court and the Court of Appeals in this case, the *Winston* Court held that the reasonable efforts requirement is intended to benefit families, imposes a binding obligation on States accepting federal funding under Title IV-E, and is sufficiently specific to be judicially enforceable. Slip op. at 17-20.

The *Winston* Court then concluded, however, that the plaintiffs had failed to establish a violation of that right. Relying on the Seventh Circuit's decision in this case and on this Court's decision in *Wilder*, the Court in *Winston* recognized that Congress, while creating a binding obligation, had afforded States substantial discretion in how they implement the reasonable efforts requirement. Slip op. at 22-23. After examining the record, which included expert testimony, the Third Circuit concluded that Pennsylvania had exercised that discretion appropriately in providing one hour visits to parents every other week. *Id.* at 22-24. In other words, the efforts made by Pennsylvania were within the range of efforts permitted the State

[2] The *Winston* plaintiffs also unsuccessfully challenged Pennsylvania's visitation policies and practices on constitutional grounds. Slip. op. at 24-28.

under 42 U.S.C. § 671(a)(15), and the *Winston* plaintif failed to sustain their heavy burden to show otherwis *Id.* at 24. *See also Wilder,* 110 S. Ct. at 2523 and n.18. Aft dismissing the plaintiffs' remaining arguments, the Cou of Appeals affirmed the District Court's judgment i favor of the State and County defendants. Slip op. at 3

Winston thereby confirms that enforcement of th reasonable efforts requirement will not subject federa courts to the "flood of individual lawsuits," Defendant Brief at 35, which defendants unreasonably fear.

Respectfully Submitted,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF

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No. 90-1488

IN THE

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OCTOBER TERM, 1991

SUE SUTER, *et al.*,

Petitioners,

v.

ARTIST M., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Petitioners, Sue Suter and Gary T. Morgan, respectfully move this Court, pursuant to Supreme Court Rule 25.5, for leave to file a Supplemental Brief for Petitioners in response to Respondents' Supplemental Brief After Oral Argument. In support of their motion, petitioners state as follows:

1. On January 22, 1992, respondents filed a motion for leave to file Respondents' Supplemental Brief After Oral Argument. Respondents' Supplemental Brief asserts that the Consent Decree entered in *B.H. v. Suter*, No. 88 C 5599 (N.D. Ill. Dec. 20, 1991) (Grady, J.), supports their contention that Section 671(a)(15) of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(a)(15), creates individually enforceable federal rights. Respondents also suggest the Consent Decree may have rendered this case moot.

2. Despite respondents' claims, it is clear on the face of the *B.H.* Decree that it neither supports respondents' position in this case nor renders the case moot. While petitioners believe the *B.H.* Consent Decree is utterly irrelevant to the issues in this appeal, respondents' Supplemental Brief raises a number of misleading assertions that require a brief response.

WHEREFORE, petitioners respectfully request that this Court grant petitioners leave to file the Supplemental Brief for Petitioners.

Dated: February 3, 1992

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SUPPLEMENTAL BRIEF FOR PETITIONERS

This Supplemental Brief for Petitioners is respectfully submitted in response to Respondents' Supplemental Brief After Oral Argument ("Supplemental Brief") regarding the Consent Decree entered in *B.H. v. Suter*, No. 88 C 5599 (N.D. Ill. Dec. 20, 1991) (Grady, J.).[1] Plaintiffs' Supplemental Brief initially urges this Court to embrace the Decree as legal authority for a ruling in plaintiffs' favor on the merits of this case. (Supp. Br. 4-6). This contention obviously overlooks the fact that a consent decree is not a judicial ruling on the legal issues in *B.H.* and has no effect on issues that may be raised in a separate cause of action such as this one. Moreover, plaintiffs completely misread the provisions of the *B.H.* Decree, which do not include any requirements regarding the timely assignment of caseworkers.

Plaintiffs also include in the Supplemental Brief a tepid suggestion that the *B.H.* Decree "may" affect this Court's jurisdiction in that the Decree "may" render all or part of this case moot. (Supp. Br. 7-10). Plaintiffs therefore ask this Court in the alternative to remand the case for consideration as to whether it is moot. Notably, plaintiffs do not request that the preliminary injunction be vacated and this case dismissed, as would be required if the case were truly moot. *See, e.g., United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).[2] Plaintiffs make no such request because it is clear from the plain language of the *B.H.*

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[1]Plaintiffs indicate in their Supplemental Brief that they have requested that the Clerk of the Court distribute copies of the Decree to the members of the Court. (Supp. Br. n.1).

[2]Plaintiffs' enthusiasm for the *B.H.* Decree in this Court is ironic, as plaintiffs' counsel has filed an appeal in the United States Court of Appeals for the Seventh Circuit challenging the entry of that Decree. Mot. for Leave to File Supp. Br. After Oral Arg. n.1. Thus, plaintiffs are asking this Court to consider this case moot based on a decree that plaintiffs' counsel currently is seeking to vacate. This gambit, if successful, would deny defendants review of a standing injunction in this case *and* deny defendants the benefit of the settlement negotiated in *B.H.* Consequently, defendants respectfully ask this Court, if it decides to remand this case for mootness, to follow the *Munsingwear* rule, and also vacate the rulings of the court of appeals and district court and direct that the case be dismissed.

Decree that in the absence of the preliminary injunction here, DCFS is under no obligation to assign caseworkers within three days after the first court hearing or after the previously assigned caseworker leaves DCFS or is absent. *See* March 2, 1990 Preliminary Inj. (App. 56a). Contrary to plaintiffs' suggestion, their claim that Section 671(a)(15) of the federal Adoption Assistance and Child Welfare Act of 1980 (the "AAA"), 42 U.S.C. § 671(a)(15), may be enforced under 42 U.S.C. § 1983 and requires in this case the prompt assignment of caseworkers remains a very live controversy. (*See* Resp. Br. i).

Thus, plaintiffs' entire Supplemental Brief is completely unfounded, and has resulted in unnecessary delay and a needless increase in the cost of this litigation. A remand is wholly unwarranted and would serve only to exacerbate this waste of time and limited judicial and public resources.[4] This Court is capable of determining from the face of the *B.H.* Decree its effect—or, more accurately, lack of effect—on the case before the Court. Defendants respectfully urge this Court to consider this case on the merits and reverse the decision of the court of appeals.

ARGUMENT

I. PLAINTIFFS MISREAD THE *B.H.* CONSENT DECREE, WHICH NOWHERE REQUIRES THE PROMPT AND CONTINUOUS ASSIGNMENT OF CASEWORKERS

The *B.H.* Decree sets forth a settlement agreed to by DCFS in a separate federal class action challenging a series of alleged statewide deficiencies in the Illinois foster care system.[5] None of the claims raised in *B.H.* involved the prompt and continuous assignment of caseworkers, the gravamen of plaintiffs' claims here. *Compare B.H. v. Johnson*, 715 F. Supp. 1387, 1387-92 (N.D. Ill. 1989) (describing claims and allegations) *and B.H.* Decree at 2

[4]The costs of litigation on both sides in this case are funded by public monies.

[5]Counsel for petitioners here also represents the defendant in *B.H. v. Suter* and was responsible for negotiating the *B.H.* Decree on behalf of the defendant.

(same) with Artist M. Compl. ¶¶ 5-9, 72 (J.A. 6-7, 25). Not surprisingly then, the *B.H.* Decree contains no provisions whatsoever requiring that caseworkers be assigned within three days, as mandated by the preliminary injunction issued below.

This silence was intentional since, as plaintiffs' counsel is well aware, the parties in *B.H.* took great care in the Decree to avoid settling issues that were the subject of other class actions already pending against DCFS, such as *Artist M.*[6] As set forth in detail below, plaintiffs' strained assertions to the contrary are based on a complete misreading of the terms of the Decree.

The "Reasonable Efforts" Provision

Plaintiffs initially cite Paragraph 8 of the Decree, in which DCFS has agreed to make "reasonable efforts to prevent or eliminate the need for removal of the child." Decree ¶ 8. Plaintiffs attempt to equate this provision with the "reasonable efforts" clause contained in Section 671(a)(15).

However, unlike Section 671(a)(15)—which contains no definition of the term "reasonable efforts"—Paragraph 8 of the Decree sets out at length what the *B.H.* parties mean by "reasonable efforts." In particular, unlike the AAA, Paragraph 8 references a specific set of "family preservation services" which are to be provided as "reasonable efforts." These services are set forth in the state law provision incorporated in Paragraph 8.[7] It is this list of

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[6]Likewise, the parties in *B.H.* agreed that the outcome of this case would have no effect on the settlement reached in the *B.H.* Decree. *See* Decree at 4.

[7]The provision cited in Paragraph 8, Ill. Rev. Stat. ch. 23, ¶ 2058.2, states in relevant part:

For purposes of this Act, the term "family preservation services" refers to all services to prevent the placement of children in substitute care, to reunite them with their families if so placed and if reunification is an appropriate goal, or to maintain an adoptive placement. The term "homemaker" includes emergency caretakers, homemakers, caretakers, housekeepers and chore services. The term "counseling" includes individual therapy, infant stimulation therapy, family therapy, group thera-

(footnote continued on following page)

services that will permit the *B.H.* court to systemically evaluate DCFS's compliance with Paragraph 8 by examining whether such services are being provided.[8] There is no comparable definition of "reasonable efforts" set forth in the AAA.

More importantly, Paragraph 8 is utterly devoid of any requirement as to the time within which these "reasonable efforts" services are to be provided. Plaintiffs' case here is founded on their assertion that Section 671(a)(15) requires that "reasonable efforts" be made within a specific time period, namely three days after the commencement of a court case. March 2, 1990 Preliminary Inj. (App. 51a); *see also* Compl. Prayer for Relief ¶ 2 (J.A. 26) (seeking caseworker assignment within twenty-four hours). This claim clearly is not addressed in any way by Paragraph 8.[9]

The "Initial Assessment" Provision

Plaintiffs next turn to Paragraph 7 of the Decree regarding "Initial Assessments," where DCFS has agreed that by July 1993, the Department will perform "initial social assessments" prior to

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(footnote continued from previous page)
py, self-help groups, drug and alcohol abuse counseling, vocational counseling and post-adoptive services. The term "day care" includes protective day care and day care to meet educational, prevocational or vocational needs. The term "emergency assistance and advocacy" includes coordinated services to secure emergency cash, food, housing and medical assistance or advocacy for other subsistence and family protective needs.

[8]Contrary to plaintiffs' suggestion (Supp. Br. 6), the reference in Paragraph 8 to "good social work practice" does not mean that the various standards promoted by plaintiffs' *amici* now are incorporated wholesale in the *B.H.* Decree. Indeed, in this case, it is the professional judgment of DCFS child welfare administrators that a rigid across-the-board time limit is *not* good social work practice. (1/17/89 Tr. 257-62; R. 84 at 4-8).

[9]Plaintiffs also cite Paragraph 16a of the Decree, which requires "reasonable efforts to reunify the family by helping the child and family address the risks to the child which prevent reunification." Decree ¶ 16a. This provision goes on to further define "reasonable efforts" in a manner similar to Paragraph 8. For the reasons set forth above, Paragraph 16a, like Paragraph 8, does not reach the issues in this case.

the time a shelter care hearing is held.[10] This initial assessment is a "preliminary assessment of the child and family sufficient to (i) permit DCFS to identify reasonable efforts, if any, that can be made to address allegations of abuse and neglect and keep a family intact; (ii) identify any needs of an emergency nature; (iii) commence to identify and preliminarily select appropriate family and relative resources. . . ." Decree ¶ 7.

Plaintiffs mistakenly assume that this paragraph requires that a DCFS follow-up caseworker, rather than an investigator, perform the initial social assessment, citing the district court finding in this case that "DCFS investigators have no role in arranging for the delivery of child welfare services." (Supp. Br. 3 & n.3). Paragraph 7 does not address the *delivery* of child welfare services; the provision carefully circumscribes the scope of the initial assessment to *identifying* reasonable efforts and emergency needs and to commencing to identify family resources. Moreover, the *B.H.* Decree itself, unlike the district court finding below, expressly provides that the term "caseworker" includes both investigators and follow-up workers. Decree ¶ 1c. Thus, plaintiffs are incorrect that Paragraph 7 necessarily requires the assignment of a follow-up caseworker.[11]

The Case Staffing and Management Provisions

Finally, plaintiffs cite a series of provisions in the *B.H.* Decree regarding case staffing and management that plainly do not address the question of the prompt and continuous assignment of follow-up caseworkers. In Paragraph 28, DCFS has agreed to

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[10]The shelter care hearing, also known as the temporary custody hearing, is the first Juvenile Court hearing held if a child is taken into DCFS custody. Ill. Rev. Stat. ch. 37, ¶ 802-9; *see also* Findings of Fact ¶¶ 1-3 (J.A. 33-34). If the case is one involving a child living at home, the first court hearing would not be a shelter care hearing. (J.A. 34). Thus, even if this provision had some bearing on the assignment of caseworkers, which it does not, it would *not* apply to Class A members living at home.

[11]In fact, DCFS provides testimony at the fairness hearing on the *B.H.* Decree indicating that the initial social assessment likely would be conducted by investigators, who would receive additional training and support to enable them to perform this function. *B.H. v. Suter*, No. 88 C 5599, Tr. of Nov. 8, 1991 Hrg. at 37-38 (Testimony of Joseph F. Loftus).

limit caseloads for follow-up workers by July 1, 1993 and July 1, 1994 to specified ceilings. This provision clearly has no effect on the preliminary injunction, as the district court's order itself explicitly states that specific caseload ceilings were not at issue in the *Artist M.* injunction proceedings and are not imposed by the injunction order. (App. 55a-56a).

Plaintiffs also refer to Paragraph 10 of the Decree, which states that the Interim Service Team ("IST") approach to case staffing will be eliminated by July 1, 1993. There is nothing in Paragraph 10 that requires DCFS to continue assigning cases within three days as required by the injunction here; likewise, the *Artist M.* injunction does not require DCFS to use the IST approach to assign cases.[12]

Moreover, plaintiffs' Supplemental Brief overlooks their prior arguments that the IST solution to initial caseworker assignments did not address the problem of reassigning cases when workers were absent or left the Department. (Resp. Br. 8; J.A. 40, 44-45). Thus, the injunction requires that cases be reassigned within three days after the previously assigned caseworker "relinquishes responsibility for any portion of a case." (App. 56a). Paragraph 28d of the *B.H.* Decree, however, permits DCFS to assign supervisors, not follow-up caseworkers, to cases because of a short-term caseworker absence or vacancy. Accordingly, the Decree, unlike the injunction, specifically contemplates gaps in the reassignment of cases that may *exceed* three days.[13]

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[12]Paragraph 10 was included in the *B.H.* Decree to address concerns raised by the *B.H.* plaintiffs that the IST approach resulted in too many different caseworkers handling the same case. In contrast, the district court disregarded DCFS's expressed fear that the injunction here would exacerbate the problem of assigning cases to multiple caseworkers in order to meet an across-the-board time limit on assignments. (R. 85 at 37).

[13]Plaintiffs also refer to Paragraph 26c of the Decree, which requires a case management system that "identifies a caseworker . . . with the training, competence and authority to carry out Department policies . . . and the terms of this Decree." This provision does not require that such a caseworker be continuously identified and assigned, or assigned within three days or any specified time period at all. Indeed, the object of this provision was to ensure that caseworkers are trained, competent, and have sufficient authority to accomplish assigned tasks, not that they be assigned quickly.

II. THE *B.H.* DECREE HAS NO BEARING ON THE CASE BEFORE THIS COURT

A. The *B.H.* Decree Is Irrelevant to This Court's Interpretation of Section 671(a)(15) of the AAA

Plaintiffs initially argue that the *B.H.* Decree supports plaintiffs' legal position on the merits of this case. Plaintiffs attempt to cast the Decree as some sort of admission by DCFS that Congress has sufficiently defined the "reasonable efforts" clause in Section 671(a)(15) so as to create a federal right enforceable under 42 U.S.C. § 1983.

The Decree itself, however, explicitly states that "by agreeing to this Decree neither party makes any express or implied admission of fact or law." Decree ¶ 2. Indeed, as this Court has recognized, a consent judgment unaccompanied by judicial findings on the merits is not binding on the parties on any legal issue which might arise in another cause of action. *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 327 (1955); *see also* 2 *Newberg on Class Actions* § 12.49 (2d ed. 1985).

Moreover, the fact that DCFS chose to agree to provisions in *B.H.* that may exceed the scope of federal law is irrelevant. As this Court recently reiterated, "to 'save themselves the time, expense, and inevitable risk of litigation,' petitioners could settle the dispute over the proper remedy for the constitutional violations that had been found by undertaking to do more than the Constitution itself requires, but also more than what a court would have ordered absent the settlement." *Rufo v. Inmates of Suffolk County Jail*, 60 U.S.L.W. 4100, 4105-06 (U.S. Jan. 15, 1992) (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971)).

Furthermore, as set forth above, the *B.H.* Decree, as distinct from the AAA, expressly defines the term "reasonable efforts" used in Paragraphs 8 and 16a. *Supra* at 3-4. The fact that the parties to the *B.H.* Decree crafted a definition of "reasonable efforts" that both sides could agree upon has no bearing whatsoever on whether the undefined term in Section 671(a)(15) creates a federal right. Indeed, if anything, the *B.H.* Decree serves to underscore the vagueness inherent in Section 671(a)(15): for example, unlike the Decree, Section 671(a)(15) makes no mention

of the best interests of the child, does not reference a specific list of services, and does not make clear that custody can be taken regardless of this requirement if a child is in imminent danger.[14]

B. The *B.H.* Decree Does Not Render This Case Moot

In the alternative to a ruling on the merits, plaintiffs half-heartedly intimate that the *B.H.* Decree may render all or part of this case moot. The disingenuous nature of plaintiffs' suggestion, however, is evidenced by their failure to ask this Court to vacate the existing injunction against defendants should this Court find the case truly moot.[15] Plaintiffs apparently seek to deny defendants the right to a review by this Court of an injunction plaintiffs intend to leave intact. As this Court held in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 573 (1984), such a maneuver is untenable:

> [Plaintiffs] cannot invoke the jurisdiction of a federal court to obtain a favorable [ruling] and then insulate that ruling from appellate review by claiming that they are no longer interested in the matter, particularly when the [ruling] continues to have adverse effects on the other parties to the action.

The inference to be drawn from plaintiffs' glaring omission is that they believe that the injunction is still necessary to insure the

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[14]Plaintiffs also contend they should prevail on the merits because the preliminary injunction "cannot be viewed as either unduly burdensome or unrealistic" in light of the far more extensive obligations in the *B.H.* Decree. (Supp. Br. 5). Plaintiffs' argument is beside the point. The sole issue before this Court is whether there is a legal basis for plaintiffs' claims, namely whether Section 671(a)(15) creates a federal right that may be enforced by plaintiffs. (*See* Pet. Br. i, 3 n.2, 6). The relative burden of the preliminary injunction is irrelevant.

[15]Plaintiffs' feeble attempt to raise a factual question regarding mootness is unavailing. (Supp. Br. 7-8). The entire basis for plaintiffs' mootness claim rests on the terms of the *B.H.* Decree, which this Court is capable of reviewing and evaluating. Thus, this case is not similar to *Johnson v. Board of Educ.*, 449 U.S. 915 (1980), *after remand*, 457 U.S. 52 (1982) (cited at Supp. Br. 8), where, in connection with implementing a consent decree in a separate action, the defendant school board announced it had voluntarily discontinued the use of racial quotas in high school admissions. The use of quotas was not the specific subject of the related consent decree, thus a factual question existed as to the extent of the school board's voluntary actions.

prompt and continuous assignment of caseworkers, notwithstanding their assertions that "*B.H.* ultimately provides all of the relief which plaintiffs here sought regarding initial caseworker assignment." (Supp. Br. 7). Indeed, the Decree nowhere requires that follow-up caseworkers be assigned in all cases within three days after the first court hearing (nor does it provide for such assignment within twenty-four hours as originally sought in plaintiffs' Complaint).[16] (J.A. 26). Moreover, most of the *B.H.* provisions cited by plaintiffs will not take effect for at least another year and a half, or longer. Clearly, the *B.H.* Decree does not provide the relief afforded plaintiffs under the injunction order, which has been effective since May 31, 1990.[17] (App. 56a).

Plaintiffs further try to confuse the issue with respect to the members of Class A who are children living at home. The *B.H.* class includes only children who are in DCFS custody and have been placed somewhere other than their home. Decree ¶ 1e. Yet plaintiffs initially assert that they believe plaintiffs living at home will be able to enforce the terms of the *B.H.* Decree.[18] (Supp. Br. 7). Later in their Brief, plaintiffs suggest without explanation that remand is necessary because "[t]he claims of some of the plaintiffs have been mooted by *B.H.* [while] [o]ther plaintiffs' claims may survive." (Supp. Br. 9). Neither proposition is valid. The *B.H.*

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[16]Even if, *arguendo*, the *B.H.* Decree had some effect on the preliminary injunction, both the district court and the court of appeals held that the AAA creates an enforceable right to "reasonable efforts." As this Court noted in *Stotts*, "[t]hese rulings remain undisturbed, and we see no indication that respondents concede in urging mootness that these rulings were in error and should be reversed. To the contrary, they continue to defend them. . . . For this reason alone, the case is not moot." *Stotts*, 467 U.S. at 569-70.

[17]Thus, this case is not remotely similar to *American Foreign Service Association v. Garfinkel*, 490 U.S. 153 (1989), in which the federal regulations at issue already had been changed and individualized notice already provided to affected federal employees. (Supp. Br. 9-10).

[18]In fact, this proposition is directly contrary to long-standing precedent of this Court. As stated in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975), "a well-settled line of authority from this Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it."

Decree has the same effect on the claims of *all Artist M.* class members, namely *no* effect.[19]

In order to prevail on their mootness argument, plaintiffs bear a heavy burden of showing that it is " 'absolutely clear,' absent the injunction, 'that the allegedly wrongful behavior could not reasonably be expected to recur.' " *Vitek v. Jones*, 445 U.S. 480, 487 (1980) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). Plaintiffs have utterly failed to meet this burden, and their claim of mootness should be disregarded in its entirety.

CONCLUSION

WHEREFORE, petitioners respectfully ask that this Court reverse the decision of the United States Court of Appeals for the Seventh Circuit.

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[19]Accordingly, plaintiffs' attempt to analogize this case to *Kremens v. Bartley*, 431 U.S. 119 (1977), is unavailing, as the *B.H.* Decree does not fragment the *Artist M.* class with respect to the issue of the assignment of caseworkers within three days, or even the provision of "reasonable efforts" within that time. (Supp. Br. 9-10). The remaining authority in the Supplemental Brief is similarly inapposite. *See J. Aron & Co. v. Mississippi Shipping Co.*, 361 U.S. 115 (1959) (consent decree entered in case before the Court, *not* a wholly separate case) (cited at Supp. Br. 8); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) (remand ordered because courts below had misapplied the law and failed to make sufficient factual findings) (cited at Supp. Br. 10).

No. 90-1488

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SUE SUTER, *et al.*,

Petitioners,

v.

ARTIST M., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION OF RESPONDENTS FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT AND SUPPLEMENTAL BRIEF

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT

Plaintiffs, Artist M., *et al.*, through their attorney and next friend, Patrick T. Murphy, respectfully move this Court, pursuant to Supreme Court Rule 25.5, for leave to file a supplemental brief regarding the entry of a consent decree in a related case, *B.H. v. Suter*, No. 88 C 5599 (N.D. Ill.), which may bear on the Court's jurisdiction over this case. In support of their motion, plaintiffs state as follows:

1. Plaintiffs brought this case against the Director of the Illinois Department of Children and Family Services

(DCFS) under 42 U.S.C. § 1983, the Fourteenth Amendment, and the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-628, 670-679a (the AACWA).

2. On December 2, 1991, the Court heard oral argument in this case regarding the enforceability of the AACWA's requirement that participating States make reasonable efforts to prevent the need for removing children from their families and reasonable efforts to make it possible for foster children to return to their families. 42 U.S.C. § 671(a)(15).

3. Later that month, on December 20, 1991, the United States District Court for the Northern District of Illinois entered a consent decree in *B.H. v. Suter*.

4. The plaintiff class in *B.H.* includes all of the children in Class B in this case. Like the plaintiffs here, the *B.H.* plaintiffs raised numerous claims against DCFS's Director under the AACWA, including claims based on the reasonable efforts requirement.

5. The consent decree contains a judicially enforceable agreement by DCFS to make reasonable efforts to keep children with their families and to return foster children to their families. It also constituted a final resolution of plaintiffs' claims in that case.

6. As plaintiffs explain more fully in their supplemental brief, the *B.H.* consent decree arguably renders the claims of some of the plaintiffs here moot. As a result, it may have an effect on the Court's jurisdiction over this case. Additionally, a number of the provisions of the consent decree support plaintiffs' position on the merits in this case.

7. The parties have a " 'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation." *Board of License Commissioners of the Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985), *quoting Fusari v. Steinberg*, 419 U.S.

379, 391 (Burger, C.J., concurring). Thus, plaintiffs seek to inform the Court of the effect of *B.H.* through their supplemental brief.

8. In a January 10, 1992, letter to the Clerk of the Supreme Court, defendant contends that the *B.H.* consent decree, though entered by the District Court after oral argument in this case, does not constitute an "intervening matter" under Rule 25.5, because the District Court had tentatively approved a consent decree on August 29, 1991. Defendant suggests that plaintiffs or amici should have addressed any concerns regarding the "potential mootness" of this case at that time. Letter at 1.

9. Defendant, however, is mistaken in her understanding of the effects of a tentative consent decree. Even if preliminarily approved by the District Court, a *tentative* settlement agreement does not moot the parties' claims. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, n.3. *See also Washington v. Washington State Commercial Passenger Fishing Association*, 443 U.S. 658, 692 n.32 (1979) (possibility that subsequent events may render case moot does not prevent Court from addressing merits of case). Only upon its final approval can a consent decree have such effect. *See, e.g., J. Aron & Co. v. Mississippi Shipping Co.*, 361 U.S. 115 (1959). Similarly, a tentative settlement cannot moot claims in a related case.

10. That point is underscored by the role in *B.H.* of counsel for the *Artist M.* plaintiffs. Counsel for the plaintiffs in this case attempted unsuccessfully to intervene in *B.H.* because they did not believe that their clients' interests were being protected. Plaintiffs' counsel in this case also objected to the entry of the consent decree in *B.H.* at a hearing in November 1991.[1] Thus, any suggestion by plaintiffs regarding *B.H.*'s effects on this case would have

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[1] Plaintiffs' counsel in this case are also appealing the *B.H.* District Court's decision to enter the decree and its denial of their motion to intervene in that case.

been premature prior to its entry by the District Court in late December.

11. Finally, apart from whether the consent decree constitutes an "intervening matter" under Supreme Court Rule 25.5, plaintiffs remain obligated under *Pastore* to apprise this Court of the decree, given its possible effects on plaintiffs' claims and the Court's jurisdiction in this case.

WHEREFORE, plaintiffs respectfully request that this Court grant them leave to file a supplemental brief regarding the impact of the *B.H.* consent decree on this case.

Respectfully submitted,

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1B J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 0.409[5] (2nd ed. 1991) 8

RESPONDENTS' SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT

On December 20, 1991, the United States District Court for the Northern District of Illinois entered a consent decree in *B.H. v. Suter*, No. 88 C 5599. Plaintiffs respectfully submit this brief, in accordance with Supreme Court Rule 25.5 and this Court's opinion in *Board of License Commissioners of the Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985), to advise the Court of the impact of the *B.H.* consent decree on this case.

I. THE *B.H.* CONSENT DECREE [1]

B.H. v. Suter was brought on behalf of all children in the custody of the Illinois Department of Children and Family Services (DCFS), seeking injunctive and declaratory relief under 42 U.S.C. § 1983, to remedy DCFS's systemic failure to provide them with adequate care. The plaintiff class in *B.H.* consisted of "all persons who, on or after [June 29, 1988], are in the custody of [DCFS] and have been placed somewhere other than with their parents." Decree at 1-2. The defendant in *B.H.*, as in this case, is Sue Suter, the Director of DCFS.

The plaintiffs in *B.H.* presented claims against DCFS under both the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-628, 670-679a (the AACWA), and the Fourteenth Amendment. Amended Complaint at ¶ 1, Second Amended Complaint at ¶ 1. In particular, the *B.H.* plaintiffs—like the plaintiffs here—alleged that DCFS had failed to comply with its obligations under the reasonable efforts requirement of the AACWA, 42 U.S.C. § 671(a)(15).[2] Amended Complaint at ¶ 30; Amendment

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[1] Amici curiae Illinois State Bar Association, *et al.*, and American Association for Protecting Children, *et al.*, submitted a copy of the *B.H.* consent decree to the Court on January 9, 1992. On January 10, 1992, plaintiffs requested that the Clerk of the Court distribute copies of the decree to the Justices.

[2] The AACWA provides, in relevant part:

> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . pro-

to Plaintiffs' Second Amended Complaint. The *B.H.* plaintiffs alleged that DCFS had failed to "[m]ake reasonable efforts to maximize the likelihood that plaintiffs can be safely returned to their homes," Amended Complaint at ¶ 30, and had failed to "provide appropriate care and services to help named plaintiffs and other members of the class return to their homes." *Id.* at ¶ 3. *See also id.* at ¶¶ 10-14, 21. After lengthy negotiations the parties entered into a consent decree, which, by its own terms, constitutes a "final resolution of all claims" set forth in the case. Decree at ¶ 79.

In the decree, DCFS has agreed to provide the "reasonable efforts" sought by the *B.H.* plaintiffs and by the plaintiffs in this case. Indeed, the consent decree requires DCFS to make reasonable efforts not only for children in DCFS's custody (*i.e.*, current plaintiff class members in *B.H.*), but also for children who continue to reside with their parents.

Paragraph 8 of the decree, for example, reaffirms DCFS's statutory obligation to make reasonable efforts to keep families together:

> 8. Reasonable Efforts To Prevent Placement. As of the date of the entry of this Order, DCFS shall not remove a child from a parent or continue the removal by another person authorized to take protective custody under state law . . . *unless DCFS has made reasonable efforts to prevent or eliminate the need for removal of the child.* "Reasonable efforts" as used in this paragraph and paragraph 7 means such efforts to preserve the family as are consistent with good social work practice based on the individual circumstances of the case and the best in-

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vides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home. . . .

42 U.S.C. § 671(a)(15).

> terest of the child, and may include but are not limited to the offer and provision of appropriate family preservation services from among those listed at Ill. Rev. Stat. ch. 23, § 2058.2.

Decree at ¶ 8 (emphasis added). In addition, in paragraph 7 DCFS has agreed that beginning July 1, 1983, it will complete an assessment of each child's case prior to the first hearing in Juvenile Court, in order to identify the reasonable efforts that can be made to keep the family together. *Id.* at ¶ 7.

Likewise, the decree incorporates DCFS's obligation under § 671(a)(15) to make reasonable efforts to reunite foster children with their families. Paragraph 16(a) of the decree requires DCFS to fulfill this obligation by making adequate permanency plans for these children. *Id.* at ¶ 16(a). Finally, the defendant has agreed to a definition of reasonable efforts, which is tied to a standard of accepted social work practice. *Id.* at ¶¶ 8, 16(a).

The decree also implicitly and explicitly requires DCFS to remedy deficiencies in its caseworker assignment system. First, DCFS will be required to assign follow-up caseworkers before cases are brought to Juvenile Court, in order to complete the social assessment required by paragraph 7.[3] Second, the consent decree provides for improved continuity in caseworker assignment by eliminating the Interim Service Teams, Decree at ¶ 10, which, as the District Court found in this case, have been the source of countless gaps in caseworker assignment. *See, e.g.*, J.A. 43, ¶ 21; J.A. 47, ¶ 35. Third, the decree sets ceilings on the number of cases which will be handled by follow-up caseworkers who are assigned to

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[3] As the District Court found in this case, DCFS investigators have no role in arranging for the delivery of child welfare services. J.A. 34, ¶ 2. Thus, under DCFS's system, follow-up caseworkers alone will be capable of developing the social assessments described in the decree. *Cf.* J.A. 36, ¶ 6.

provide services to intact families and to children in DCFS's custody. Decree at ¶ 28. Finally, under *B.H.* DCFS has agreed to ensure that each child has "a case-worker or case manager with the training, competence and authority to carry out Department polffiicies." *Id.* at ¶ 26.

The decree sets forth several monitoring and implementation provisions. *See, e.g., id.* at ¶¶ 66-74. While providing for the appointment of an independent monitor to mediate disputes regarding compliance, *id.* at ¶ 66, the parties there acknowledge that the District Court itself retains ultimate authority to enforce all terms of the decree. *Id.* at ¶ 73(d). At the same time the decree prevents class members from enforcing its terms "based solely on isolated instances of non-compliance." *Id.* at ¶¶ 6, 73(e).

Finally, the decree acknowledges the pendency of this case before this Court. *Id.* at p. 4. It provides that the "final disposition of the issues raised by the *Artist M.* case will not be a basis for modification of [the] Decree." *Id.*

II. THE *B.H.* CONSENT DECREE SUPPORTS THE POSITION OF THE *ARTIST M.* PLAINTIFFS ON THE MERITS.

Defendant's principal contention in this case is that the reasonable efforts requirement contained in 42 U.S.C. § 671(a)(15) is so vague and amorphous that it is beyond the competence of federal courts to enforce. *See, e.g.*, Petition at 15. Defendant insists that the AACWA's reasonable efforts requirement can be enforced, if at all, only in the context of individual state court cases. *See, e.g.*, Brief at 27, 29-30, 41. Defendant's entry into the consent decree in *B.H.* completely undercuts this argument.

In the decree defendant unequivocally agrees that DCFS's obligation to make reasonable efforts to preserve

and reunite families *is* enforceable in federal court—namely, by the District Court with jurisdiction over *B.H.* Decree at ¶ 73(d). Moreover, the consent decree authorizes enforcement of its terms—including the reasonable efforts provisions in paragraphs 8 and 16(a)—*only* when they have been systematically violated. *Id.* at ¶ 6 ("[n]o class member is permitted to enforce this Decree based solely on isolated instances of non-compliance . . . with any . . . provisions in this Decree"); *id.* at ¶ 73(e) (same). Thus, *B.H.* fully supports the approach taken by the courts below in this case. As DCFS has agreed in *B.H.*, federal courts may competently remedy a State's systematic violation of its obligation to make reasonable efforts to preserve and reunite families.

Defendant's approval of the B.H. consent decree supports plaintiffs' position in this case in other ways. Under *B.H.* defendant has agreed that, regardless of the outcome of this case, DCFS can and will assign caseworkers far more quickly than contemplated by the preliminary injunction here. As noted above, *supra* at 3, to complete a social assessment in accordance with paragraph 7 of the decree, DCFS will be required to assign a follow-up caseworker to each child and family even *before* their cases ever appear in court. The preliminary injunction entered below, by contrast, requires the assignment of a caseworker within three days *after* the case is heard in Juvenile Court. Pet. App. at 56a. Moreover, in *B.H.* defendant has also agreed to establish strict caseload ceilings far beyond anything that might be required under the preliminary injunction. *Supra* at 3-4. Indeed, the District Court here rejected caseload ceilings as a remedy, requiring only that DCFS assign caseworkers who are capable of delivering child welfare services. Pet. App. at 55a n.3. Thus, given that DCFS has agreed to do far more in the consent decree, the preliminary injunction cannot be viewed as either unduly burdensome or unrealistic. On the contrary, the

injunction illustrates that federal courts are fully capable of crafting appropriate remedies for violations of the AACWA in light of a State's true institutional capabilities. *See* Plaintiffs' Brief at 27.

Finally, DCFS's adoption of a definition of "reasonable efforts" in the *B.H.* consent decree completely undermines its claim that the reasonable efforts requirement in § 671(a)(15) can have no objective meaning under any set of circumstances. Defendants' Brief at 30. The decree defines reasonable efforts to mean "such efforts to preserve the family as are consistent with good social work practice based on the individual circumstances of the case and the best interest of the child." Decree at ¶¶ 8, 16(a). As plaintiffs and amici curiae have argued, certain professional standards for social work can be applied objectively and systematically—namely, those which relate to caseworker assignment. *See* Plaintiffs' Brief at 26 n.9; Brief of American Association for Protecting Children, *et al.*, at 22-29; Brief of National Association of Counsel for Children, *et al.*, at 15 n.10. Plaintiffs acknowledge that the reasonable efforts requirement does not expressly adopt those standards. Nonetheless, by implicitly incorporating them into the definition of "reasonable efforts" in *B.H.*, defendant concedes that the reasonable efforts requirement can have an objective meaning. And in the context of DCFS's caseworker assignment system, it unquestionably does. *See* Plaintiffs' Brief at 25-27.

In short, the *B.H.* consent decree offers substantial support for plaintiffs' position on the merits. The consent decree confirms both the competence of federal courts to enforce plaintiffs' rights under § 671(a)(15) and the propriety of the remedy crafted by the District Court in this case.

III. THE *B.H.* CONSENT DECREE MAY AFFECT THIS COURT'S JURISDICTION OVER THIS CASE.

In order for this Court to retain jurisdiction, "[t]here must be a live case or controversy before [it]." *Kremens v. Bartley*, 431 U.S. 119, 129 (1977), *citing Sosna v. Iowa*, 419 U.S. 393, 402 (1975). The *B.H.* consent decree, however, has materially changed—if not eliminated—the controverted issues with respect to plaintiffs' claims here. *See Kremens*, 431 U.S. at 130.

First, in *B.H.*, DCFS has agreed to make reasonable efforts to prevent or eliminate the need for removing children from their families. Decree at ¶ 8. Although they are not members of the *B.H.* plaintiff class, children residing at home with their parents are thereby beneficiaries of the consent decree. Notwithstanding paragraph 3 of the consent decree, they may enforce this provision of the decree in the District Court, pursuant to Rule 71 of the Federal Rules of Civil Procedure. *B.H.* thus resolves both questions presented with respect to a sizable percentage of the class members in *Artist M.* Pet. at i. Children living at home have a right, enforceable in federal court, to reasonable efforts to keep them with their families.

Second, *B.H.* ultimately provides all of the relief which plaintiffs here sought regarding initial caseworker assignment, thereby raising additional mootness questions. Beginning July 1, 1993, DCFS must assign a caseworker to each of the plaintiffs prior to the commencement of their cases in Juvenile Court. *Supra* at 3. In addition, *B.H.* sets specific numerical limits on case assignment. *Supra* at 3-4. As a result *B.H.* goes well beyond the injunction's requirement that a caseworker be assigned no later than three days after a case is initiated in Juvenile Court. The consent decree also provides significant relief to children who would otherwise be without caseworkers at later stages of their cases. By eliminating the Interim Service Teams, the decree will significantly reduce the number of gaps in caseworker assignment,

supra at 3, which may further obviate the need for the preliminary injunction.

Third, the *res judicata* effects of the consent decree may also render much of this case moot. The *B.H.* plaintiff class includes all of the members of Class B in this case. *Compare* Decree at ¶ 1(e) *with* R. 10 at 1. Sue Suter, the Director of DCFS, is the defendant in each case.[4] The *B.H.* plaintiff class asserted rights and sought relief under the AACWA's reasonable efforts requirement in much the same manner as the plaintiffs here. *Compare supra* at 2 *with* J.A. 7-8, ¶¶ 7, 10 (allegations by Artist M., *et al.*, that DCFS had failed "to identify and deliver necessary services" for them and their families and had failed "to make reasonable efforts to prevent or eliminate the need for their removal from their homes [and] . . . to facilitate family reunification when removal has occurred"). The consent decree has resolved those claims between the parties, and its *res judicata* effects, 1B J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 0.409[5] (2nd. ed. 1991), may moot any continued litigation regarding § 671(a)(15) by the Class B plaintiffs here. *Cf. J. Aron & Co. v. Mississippi Shipping Co.*, 361 U.S. 115 (1959).

In combination, these factors raise significant questions about the Court's continued jurisdiction over this case. However, none of these questions has been addressed by the parties or by the courts below.

In *Johnson v. Board of Education of the City of Chicago*, 449 U.S. 915 (1980), *on remand*, 457 U.S. 52 (1982), this Court confronted a nearly identical situation. There, the defendant had entered into a consent decree in a related case which had significant bearing on the legal and factual issues being considered by this Court. 457 U.S.

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[4] Plaintiffs in *Artist M.* named Gary T. Morgan, DCFS's Guardianship Administrator, as a defendant as well. The District Court noted, however, that Morgan lacks a meaningful role as a party here. Pet. App. 33a n.1.

at 52-53. Because of the possibility that the consent decree had mooted the *Johnson* case, the Court vacated the Court of Appeals' judgment and remanded the case for further consideration in light of the consent decree. 449 U.S. at 915.

In *Kremens* this Court resolved a comparable case in a similar fashion. There, regulations and legislation adopted after the plaintiffs filed their complaint mooted the claims of the named plaintiffs and a large number of unnamed plaintiffs and drastically altered the claims of many of the remaining unnamed plaintiffs. 431 U.S. at 128-32. Because of their differing effects on various class members, the regulations and legislation left the plaintiff class "truncated and compartmentalized." *Id.* at 132. Consequently, before addressing any "live" claims, the Court remanded the case for reconsideration of the class definition and for consideration of the issue of mootness. *Id.* at 134-35.

Finally, in *American Foreign Service Association v. Garfinkel*, —— U.S. ——, 109 S. Ct. 1693 (1989), federal regulations adopted after the District Court's ruling, as well as a decision by the District Court in related cases, "place[d] th[e] case in a light far different from the one in which that court considered it." *Id.* at 1696. Those intervening regulations rendered moot the claims of certain plaintiffs. Their effect on other plaintiffs' claims remained an open question, requiring further factual development in the District Court. *Id.* at 1697. With part of the controversy moot and other parts possibly retaining vitality, the Court vacated the judgment below and remanded the case for further proceedings. *Id.*

The *B.H.* consent decree has had an analogous effect on this case. The claims of some of the plaintiffs have been mooted by *B.H.* Other plaintiffs' claims may survive. Likewise, the class definitions may require modification in light of the different effects *B.H.* will have on the various plaintiffs here. In short, "[t]he controversy as it exists

today is . . . quite different from the one that the District Court considered." *Garfinkel*, 109 S. Ct. at 1696. Consequently, as in *Johnson*, *Kremens* and *Garfinkel*, the District Court's consideration of recent developments may be appropriate in order to adjudicate this case in the most informed manner.

Finally, even if *B.H.* does not render this case moot, at the very least it has fundamentally altered the legal and factual landscape between the parties in this case. For that reason alone, it may be appropriate to remand the case for further consideration in light of these developments. *See Johnson*, 457 U.S. 52 (1982) (vacating judgment of Court of Appeals and remanding case with directions that it be consolidated with related District Court case to permit complete development of factual record). *See also Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986) (affirming remand to District Court for additional findings to permit Court to pass upon legal question presented to it).

CONCLUSION

In light of the entry of the consent decree in *B.H.*, plaintiffs respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Seventh Circuit or, in the alternative, remand this case with directions to consider whether it is moot.

Respectfully submitted,

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